

# TRANSCRIPT OF RECORD.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1912.

No. 56.

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FREDERICK C. ROBERTSON, APPELLANT,

vs.  
EDWARD M. BUTLER, MARION BUTLER, AND  
WALDEMAR W. VALE, INDIVIDUALLY AND AS PARTNERS  
IN THE FIRM NAME AND STYLE OF BUTLER AND VALE.

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APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF  
COLUMBIA.

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FILED MAY 12, 1912.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 56.

FREDERICK C. ROBERTSON, APPELLANT,

vs.

HUGH H. GORDON, MARION BUTLER, AND JOSIAH M. VALE, INDIVIDUALLY AND AS PARTNERS UNDER THE FIRM NAME AND STYLE OF BUTLER AND VALE.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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# In the Court of Appeals of the District of Columbia.

No. 2077.

FREDERICK C. ROBERTSON, Appellant,  
vs.  
HUGH H. GORDON et al.

a Supreme Court of the District of Columbia.

In Equity. No. 28006.

FREDERICK C. ROBERTSON, Plaintiff,  
against

HUGH H. GORDON, MARION BUTLER, and JOSIAH M. VALE, Individually and as Partners under the Firm Name and Style of Butler & Vale; George B. Cortelyou, Secretary of the Treasury; James R. Garfield, Secretary of the Interior; Charles H. Treat, Treasurer of the United States of America, Defendants.

UNITED STATES OF AMERICA,  
*District of Columbia, ss:*

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above entitled cause, to wit:

1 *Bill.*

Filed August 26, 1908.

In the Supreme Court of the District of Columbia.

No. 28006.

FREDERICK C. ROBERTSON, Plaintiff,  
against

HUGH H. GORDON, MARION BUTLER, and JOSIAH M. VALE, Individually and as Partners under the Firm Name and Style of Butler and Vale; George B. Cortelyou, Secretary of the Treasury; James R. Garfield, Secretary of the Interior; Charles H. Treat, Treasurer of the United States of America, Defendants.

To the Honorable the Supreme Court of the District of Columbia, holding an Equity Court:

The Plaintiff states as follows:

(1.) That he is a citizen of the State of Washington, residing at Spokane, in said State, and brings this suit in his own right, as an

attorney and counsellor-at-law, as the claimant to an undivided part of the moneys, properties, awards and evidences thereof hereinafter in this Bill of Complaint set out.

(2.) That the defendant Hugh H. Gordon is a citizen of the State of Florida, residing at Biscayne, in said State, and is sued in this action as the claimant in his own right to an undivided part in the moneys, properties, awards and evidences thereof hereinafter in this Bill of Complaint set out.

That the defendant Marion Butler and the defendant Josiah M. Vale are partners under the firm name and style of Butler and Vale, attorneys and counsellors-at-law, having their and each of their place of business, being domiciled and to be found in the District of Columbia, and they and each of them are sued herein individually and as such partners, and as having an indeterminate interest in and control and custody of the moneys, properties, awards and evidences thereof involved in this suit, without title to or interest in any part of the sum and sums claimed by plaintiff and said defendant Gordon, except to the several and respective use of plaintiff and said defendant Gordon.

That the defendant George B. Cortelyou is the Secretary of the Treasury of the United States of America, having his office, being domiciled and to be found in the District of Columbia, and is sued as such Secretary.

That the defendant James R. Garfield is the Secretary of the Interior of the United States of America, having his office, being domiciled and to be found in the District of Columbia, and is sued as such Secretary.

That the defendant Charles H. Treat is the Treasurer of  
2 the United States of America, having his office, being domi-  
ciled and to be found in the District of Columbia, and is sued  
as such Treasurer.

(3.) That on May 12, 1894, the Indians residing on the Colville Reservation created in the State of Washington by Executive Order dated July 2, 1872, consisting of the Columbia Indians or Moses Band, the Nez Perce Indians or Joseph Band, the Okanogan Indians, the Colville Indians, and the Lake Indians, all hereinafter referred to as the Colville Indians, through their several and respective agents, attorneys and representatives duly authorized, covenanted and agreed with Levi Maish (since deceased) and the said defendant Hugh H. Gordon to employ and engage the said Maish and the said Gordon as their attorneys and counsel to prosecute and collect their claims against the United States of America for payment for certain lands ceded, surrendered and relinquished to the United States of America, agreeing to pay to said Maish and said Gordon a sum equal to fifteen per centum (15%) of any money or sums of money which might be collected for the said Indians under the provisions of the said contract, further agreeing that said Maish and said Gordon should be paid as compensation for their services the sum of fifteen per centum of any appropriation which might be made for the payment of said claims. That it was further expressly agreed in the said contract that the fee stipulated as the

compensation of said Maish and said Gordon for their services was to be paid to them in a separate and special warrant out of any appropriation which should be made for the payment of said claims or any part thereof, and only the balance of said appropriation or appropriations should be distributed to the said Colville Indians; and that the payment of the said fees to said Maish and said Gordon was not to be delayed until the distribution of the said appropriation or appropriations to the said Colville Indians, but the disbursing officers of the United States Government were thereby authorized to issue the said separate and special warrant to pay said Maish and said Gordon as soon as any appropriation or appropriations for the payment of said claims should be available, at which time the said compensation was made due and payable; and said Maish and said Gordon agreed to take sole and absolute charge, direction and control of the prosecution of the said claims and to pay all expenses which might be incurred by them therein. That the said contract was duly executed and accepted by all the parties, and approved by the Commissioner of Indian Affairs on July 17, 1894, "On condition that the attorneys shall accept as full compensation for the services to be rendered thereunder the sum of ten per cent of the amount or amounts they shall recover to the Indians thereunder," and on July 25, 1894, was duly approved by the Secretary of the Interior on the same condition. That as so approved the said contract was accepted by said Maish, for himself and said Gordon, on January 20, 1899. The original of the said contract will be exhibited to the Court and to the parties, as may be desired or ordered.

(4.) That by the sixth paragraph thereof, the said contract was to continue in force for and during the term of ten (10) years from the date of its final execution and approval by the Commissioner of Indian Affairs and the Secretary of the Interior, to-wit: until July 25, 1904, but plaintiff avers that the said contract was impliedly continued in force, and is yet in full force and effect by virtue of the continued service thereunder, recognized, acquiesced in and confirmed by the United States of America, trustee for the said Colville Indians then and now, and by the said Colville Indians, and by the Congress of the United States of America, and accepted by said Maish and said Gordon, and by those claiming by, through and under them, or rendering service to the said Colville Indians which resulted in the prosecution and collection of the said claims in full, including plaintiff and said defendants Gordon, Butler and Vale, to the extent that the said contract was held and considered an element in determining the amount of compensation for such services, and for all services rendered by the said and all other attorneys in the said matter, as will hereinafter more fully appear.

(5.) That said Maish and Gordon, and said defendant Gordon entered into arrangements and agreements with plaintiff to assist in prosecuting and securing the collection and payment of the said claims of the said Colville Indians, and in consideration of the assistance which plaintiff agreed to and did furnish to him, the said defendant Gordon agreed to and did admit plaintiff to an equal co-partnership and share with him therein, and agreed that plaintiff

should be paid and receive certain compensation, which arrangements and agreements were afterwards adjudged, settled and reduced to writing between them in the City of Washington, District of Columbia, as follows:

MARCH 28, 1906.

This agreement made between F. C. Robertson and Hugh H. Gordon, Witnesseth, that they shall share equally in all moneys appropriated by Congress, or allowed by the Interior Department, which may accrue to said Gordon or said Robertson as attorney fees, growing out of the rendition of services to the Colville tribe of Indians, whether allowed under the Maish-Gordon contract with said tribes, or on any other theory whatsoever, which said interest is to inure to either party, no matter in whose name such allowance is made. Both parties hereto to mutually labor to secure such allowance. Out of said Robertson's share he agrees to compensate R. D. Gwydir by a reasonable compensation. The fees to be divided between said Robertson & said Gordon as herein provided shall be the net sum accruing to said Gordon, after settling with other attorneys under contracts heretofore made by said Gordon.

F. C. ROBERTSON,  
HUGH H. GORDON.

And plaintiff at said defendant Gordon's request agreed to and did advance to him a certain sum of money to aid in the prosecution of said claim, to be repaid out of the moneys awarded to said defendant Gordon for account of such services, which advance is evidenced by said defendant Gordon's acknowledgement in writing, in the words and figures following:

4

BISCAYNE, FLORIDA, March 21st, 1906.

\$150.00.

Received of F. C. Robertson, of Spokane, Washington, one hundred & fifty dollars, with which to pay expenses of trip to Washington, D. C., to look after the interests of Gordon, Gwydir and Robertson in the matter of the claims of the Indians of the Colville Reservation against the U. S. Government. In case we succeed in collecting said claim, I agree that out of my share of the profits, I will repay to said Robertson the said one hundred and fifty dollars. (\$150.00.)

HUGH H. GORDON

whereby plaintiff and said defendant Gordon were thereby given an undivided equal share and ownership in and a lien upon their respective claims, each upon the other's, and upon any award and awards made on account of the same, and upon any warrant, draft, cheque or other evidence of indebtedness which might be issued in payment thereof, and upon the proceeds of any such warrant, draft, cheque or other evidence of indebtedness, and upon the fund created by law or in any manner for the payment and satisfaction of the said claim. The originals of said agreement, acknowledgment and

receipt will be produced at the hearing, and whenever requested by the Court or any party to this suit.

(6.) That such prosecution of said claims follow, so that the same were recognized, collected and paid by the United States of America to the said Colville Indians, who accepted the same, as follows:

*Public. No. 258.*

An Act making appropriations for the current and contingent expenses of the Indian Department, for fulfilling treaty stipulations with various Indian tribes, and for other purposes, for the fiscal year ending June thirtieth, nineteen hundred and seven.

\* \* \* \* \*  
Colville Reservation.

To carry into effect the agreement bearing date May ninth, eighteen hundred and ninety-one, entered into between the Indians residing on the Colville Reservation and commissioners appointed by the President of the United States under authority of the Act of Congress approved August nineteenth, eighteen hundred and ninety, to negotiate with the Colville and other bands of Indians on said Colville Reservation for the cession of such portion of said reservation as said Indians might be willing to dispose of, there shall be set aside and held in the Treasury of the United States for the use and benefit of said Indians, which shall at all times be subject to the appropriation of Congress and payment to said Indians, in full payment for one million five hundred thousand acres of land opened to settlement by the Act of Congress "To provide for the opening of a part of the Colville Reservation in the State of Washington, and for other purposes," approved July first, eighteen hundred

and ninety-two, the sum of one million five hundred thousand dollars, and jurisdiction is hereby conferred upon the Court

of Claims to hear, determine and render final judgment in the name of Butler and Vale (Marion Butler and Josiah M. Vale), attorneys and counsellors-at-law, of the city of Washington, District of Columbia, for the amount of compensation which shall be paid to the attorneys who have performed services as counsel on behalf of said Indians in the prosecution of the claim of said Indians for payment for said land, and in determining the amount of compensation for such services the court may consider all contracts or agreements heretofore entered into by said Indians with attorneys who have represented them in the prosecution of said claim, and also all services rendered by said attorneys for said Indians in the matter of said claim. Petition hereunder shall be filed in said court by the said attorneys (Butler and Vale), within thirty days from the passage of this Act, and the Attorney General shall appear on behalf of the defendants, and said cause shall be given preference for immediate hearing in said court, and the Secretary of the Treasury is hereby authorized and directed to pay the sum of money so awarded by said court to the said attorneys (Butler and Vale), upon the rendition of final judgment, out of the said sum herein set apart

or appropriated for the benefit of said Indians, and payment of said judgment shall be in full compensation to all attorneys who have rendered services to said Indians in the matter of their said claim, the same to be apportioned among said attorneys by said Butler and Vale as agreed among themselves: *Provided*, That before any money is paid to any attorney having an agreement with Butler and Vale as to the distribution of said fees, each of the same shall execute and deliver to the Secretary of the Interior a satisfaction and discharge of all claims and demands for services rendered said Indians in the matter of their said claim. Approved, June 21, 1906. (34 Stats., 325.)

and the said fund, except so much thereof as already has been appropriated and paid to and received by the said Colville Indians is held in trust in the Treasury of the United States subject to the claim and liens of this plaintiff and the said defendants Butler, Vale and Gordon.

That an appropriation was made by Congress for a payment to the said Colville Indians, by the Act of Congress, Public 154 (H. R. 22580), entitled:

An act making appropriations for the current and contingent expenses of the Indian Department, for fulfilling treaty stipulations with various Indian Tribes, and for other purposes, for the fiscal year ending June thirtieth, nineteen hundred and eight.

\* \* \* \* \*

In part payment to the Indians residing on the Colville Reservation for the cession by said Indians to the United States of one million five hundred thousand acres of land opened to settlement by an Act of Congress "To provide for the opening of a part 6 of the Colville Reservation in the State of Washington, and for other purposes," approved July first, eighteen hundred and ninety-two, being a part of the full sum set aside and held in the Treasury of the United States in payment for said land under the terms of the act approved June twenty-first, nineteen hundred and six, ratifying the agreement ceding said land to the United States under date May ninth eighteen hundred and ninety-one, three hundred thousand dollars, said sum of three hundred thousand dollars to be paid to or expended for the benefit of said Indians under the direction of the Secretary of the Interior.

Approved March 1, 1907.

and said full sum of three hundred thousand dollars has been paid to and received by the said Colville Indians as a first payment of one-fifth the sum recovered by and for them as a result of the successful prosecution of their said claim against the United States of America, as aforesaid.

That an appropriation has been made for a further payment from the said trust fund to the said Colville Indians, by the Act of Congress, Public 104 (H. R. 15219), entitled:

An act making appropriations for the current and contingent expenses of the Indian Department, for fulfilling treaty stipulations with various Indian tribes and for other purposes, for the fiscal year ending June thirtieth, nineteen hundred and nine.

\* \* \* \* \*

For the second of five installments to the Indians residing on the Colville Reservation for the cession by said Indians to the United States of one million five hundred thousand acres of land opened to settlement by an Act of Congress "To provide for the opening of a part of the Colville Reservation in the State of Washington, and for other purposes," approved July first, eighteen hundred and ninety-two, being a part of the full sum set aside and held in the Treasury of the United States in payment for said land under the terms of the Act approved June twenty-first, nineteen hundred and six, ratifying the agreement ceding said land to the United States under date of May ninth, eighteen hundred and ninety-one, three hundred thousand dollars, to be expended for the benefit of said Indians in accordance with the provisions of the said Act setting aside in the Treasury the money in payment for the land ceded.

Approved, April 30, 1908.

And plaintiff avers that unless subjected to the payment and satisfaction of his and the other claims herein referred to for services in prosecuting and collecting the said sum set aside and held in the Treasury under the said Act of Congress of June 21, 1906, the full sum of three hundred thousand dollars, the second installment of payment, will in like manner be paid over to and received by the said Colville Indians, as well as the whole of the remainder of said sum of one million five hundred thousand dollars, set apart  
7 for the benefit of the said Colville Indians, to plaintiff's irreparable harm and injury.

(7.) That under and by virtue of the said Act of Congress of June 21, 1906, said Butler and Vale (Marion Butler and Josiah M. Vale), defendants as aforesaid, duly entered suit No. 29526, in the United States Court of Claims, at Washington, District of Columbia, against the United States of America and the Indians residing on the Colville Reservation, for the amount of compensation which should be paid to the attorneys who had performed services as counsel on behalf of the said Colville Indians in the prosecution and collection of the claim of the said Colville Indians for payment for the said land "out of the said sum \* \* \* set apart or appropriated for the benefit of said Indians," payment of said judgment to be in full compensation to all attorneys who had rendered service to said Indians in the matter of their said claim. That thereafter such proceedings were had in the said suit in the said Court of Claims that on May 25, 1908, the following order, judgment and decree were duly entered by said Court therein:

*Conclusion of Law.*

Upon the foregoing findings of fact the court decides, as conclusion of law, that claimants be awarded judgment as follows:

Benjamin Miller, administrator of the estate of Levi Maish, deceased, the sum of six thousand dollars (\$6,000).

Hugh H. Gordon, the sum of fourteen thousand dollars (\$14,000).

Marion Butler, the sum of twenty thousand dollars (\$20,000).

Josiah Vale, the sum of ten thousand dollars (\$10,000).

Daniel B. Henderson, the sum of five thousand dollars (\$5,000).

Heber J. May, the sum of three thousand dollars (\$3,000).

Frederick C. Robertson, the sum of two thousand dollars (\$2,000).

\* \* \* \* \*

*Opinion.*

The court, after full consideration of the subject-matter, taking into account the attitude of and the valuable assistance rendered by the Department of the Interior, makes the following allowances:

To Benjamin Miller, administrator of the estate of Levi Maish, deceased .....	\$6,000.
To Hugh H. Gordon.....	\$14,000.
To Marion Butler .....	\$20,000.
To Josiah Vale .....	\$10,000.
To Daniel B. Henderson .....	\$5,000.
To Heber J. May .....	\$3,000.
To Frederick C. Robertson .....	\$2,000.

8 Motion for new trial filed herein will be overruled and judgment awarded the claimants as set forth above. All other petitions and intervening petitions are dismissed.

May 25, 1908.

Which said findings, judgment, award and decree are about to be duly certified by the Court of Claims to the Treasury Department of the United States of America for payment in accordance with the aforesaid Act of Congress of June 21, 1903 adjudging the said claim of the said Colville Indians against the United States of America.

(9.) That in pursuance of the said Act of Congress of June 21, 1903, there was appropriated by an act of the Congress of the United States of America approved March 1, 1907, the sum of three hundred thousand dollars (\$300,000), as the first installment of said sum of one million five hundred thousand dollars (\$1,500,000), which said sum of three hundred thousand dollars (\$300,000), has been duly paid to and received by the said Colville Indians; that there was appropriated by the said Act of Congress of the United States of America approved April 30, 1908, and is now in the Treasury of the United States the sum of three hundred thousand dollars (\$300,000), as the second of five installments of payment for the

said lands, of which last mentioned installment the sum of sixty thousand dollars (\$60,000), is subject to be drawn therefrom in a lump sum to the order of or by said defendants Butler and Vale, or the sum of fourteen thousand dollars (\$14,000), to the order of or by said defendant Gordon, and the sum of two thousand dollars (\$2,000), to the order of or by said plaintiff Robertson, under the provisions of the said several acts of Congress hereinbefore recited, and by virtue of the findings, judgment, award and decree of the said Court of Claims duly entered as aforesaid on May 25, 1908, in the said case in the said court entitled Butler and Vale (Marion Butler and Josiah M. Vale), against the United States and the Indians residing on the Colville Reservation, No. 29526, and said withdrawals of three hundred thousand dollars (\$300,000) by or for the said Colville Indians, and of sixty thousand dollars (\$60,000), and of fourteen thousand dollars (\$14,000), respectively by or for the parties to whom awarded in the above entitled suit is threatened and imminent, to the irreparable injury of this plaintiff unless the same shall be restrained and controlled by the order of this court.

(8.) That the services rendered by plaintiff and by said defendant Gordon were extensive, laborious and important, and so recognized and adjudged by the said Court of Claims, which duly awarded to the said

Hugh H. Gordon .....	\$14,000.
Frederick C. Robertson .....	2,000.
<hr/>	
	\$16,000,

9 as the value of their joint and several services to the said Colville Indians in securing the payment and collection of their said claim, to be directly taxed and paid by the said Colville Indians out of the sum and sums appropriated by Congress and set aside and held in the Treasury of the United States of America for the use and benefit of the said Colville Indians, but the said Court of Claims made no judgment, decree or division between the parties in respect of any agreements or contracts among themselves, as and for compensation for services or expenses rendered by one of said attorneys for, or jointly with another, and such matter of agreement, contract or division was not submitted to and was not before the said court, but was expressly disclaimed by the said court in its said decision, which adjudged only the claims and demands of the several attorneys directly against and for the benefit of the said Colville Indians, for which they were or would have been responsible under the said Maish-Gordon agreement, or the said Act of Congress of June 21, 1903, or otherwise by reason of valuable services actually rendered for them and their benefit, and against and payable directly out of the said fund in the Treasury of the United States; and plaintiff avers that he is entitled to share equally in the gross sum of sixteen thousand dollars (\$16,000), awarded to said defendant Gordon and himself in the proportion of eight thousand dollars (\$8,000), to each, and to have repaid to him, said plaintiff, out of said defendant Gordon's undivided one-half share thereof, the further sum of one

hundred and fifty dollars (\$150), advanced by plaintiff to said defendant Gordon, as hereinabove set forth, that is to say, of the gross sum of sixteen thousand dollars (\$16,000), aforesaid,

plaintiff is entitled to.....	\$8,150.
and said defendant Gordon to.....	7,850.
	<hr/> \$16,000.

and plaintiff hereby offers to and does submit the said award standing in his own name as aforesaid, and the proceeds thereof and of any warrant, draft, cheque or other evidences of indebtedness issued in payment, or that may be issued in payment thereof, to the order, process and judgment of this court.

(9.) Plaintiff further represents and shows to the court that the said fund in the Treasury of the United States is a trust fund, so declared by the said Act of Congress of June 21, 1903, heretofore referred to, and that the said sum of sixty thousand dollars (\$60,000), of said gross appropriation of three hundred thousand dollars (\$300,000), is held as a part of such trust fund specifically charged with the claims of the attorneys who are parties hereto and others, upon which they jointly and severally have a lien by reason of the premises, and plaintiff, pursuant to the provisions of the said Act of Congress has notified the Secretaries of the Interior and of the Treasury of the United States of America of his claim and lien upon the said fund, and specifically upon the portion thereof awarded to said defendant Gordon, and of his own right and title to the part thereof hereinbefore set out, and that plaintiff may receive and draw the whole of said award and awards to which he claims to be entitled from the Treasury of the United States. Plaintiff further represents to the court and alleges the fact to be that unless the said defendants Butler, Vale and Gordon are restrained and enjoined from executing and delivering to the Secretary of the Interior a satisfaction and discharge of all claims and demands for services rendered the said Colville Indians in the matter of their said claim, and from receiving the said award and awards, and the said Secretary of the Treasury be restrained from paying the sum and sums of money so awarded by the said Court of Claims to the said defendants named, and the said Treasurer of the United States be restrained from issuing any warrant, draft, cheque or other evidence of indebtedness in payment of the same, and from paying any warrant, draft, cheque or other evidence of indebtedness issued by proper authority for the payment of the said award and awards, and the Secretary of the Interior be restrained from receiving said satisfaction and discharge aforesaid, and the said defendant Gordon be enjoined and restrained from assigning, transferring or encumbering the sum awarded to him as aforesaid, that the said award and awards will be paid to the said defendant Gordon, and to the said defendants Butler and Vale in pursuance of the award, judgment and decree of the said Court of Claims aforesaid, and the said sum so awarded to the said defendant Gordon, including plaintiff's undivided interest and ownership therein may be assigned and en-

10

umbered by him, thereby occasioning and necessitating a multiplicity of suits to the great and irreparable loss and injury of plaintiff, for all which he will be remediless in a court of law. Copies of plaintiff's notices to and requests upon the said Secretaries of the Treasury and Interior and the Treasurer of the United States of America are annexed hereto and marked for identification Plaintiff's Exhibits, A, B, and C, respectively.

(10.) That should defendant Gordon get possession and control of the said warrants, drafts, cheques or other evidences of indebtedness which may or might be issued in payment of the said claim and award, as plaintiff verily believes and so avers, he will leave the jurisdiction of this court with the same, or the cash proceeds thereof, and remove the same out of the jurisdiction and beyond the reach of the process of this court to the State of Florida, to the great and irreparable injury of plaintiff. That should the said defendant Gordon assign or transfer the sum so as aforesaid awarded to him in the judgment and decree of the said Court of Claims, or his claim thereto, a multiplicity of suits would thereby be necessitated to the like injury of plaintiff. That the said defendant Gordon has no property of any kind in the District of Columbia, and that a judgment at law against him would not be valuable, and that the money could not be made by execution or other process out of any known assets of the said defendant in the District of Columbia, as plaintiff is informed and believes, and so upon information and belief states. Plaintiff is uninformed whether said defendant Gordon has any financial standing, responsibility or property at the place

of his residence in Florida or elsewhere, but upon information and belief alleges that he has no property or means of any kind in the District of Columbia, and none elsewhere sufficient to meet and discharge the amount of the said award and awards, or the part thereof due and belonging to plaintiff by virtue of the premises. Plaintiff further avers that he has an equitable lien upon and an undivided interest and ownership in the said award and awards to said defendant Gordon and himself, and in and upon the proceeds thereof in said defendant Gordon's hands, and in the hands of the said defendants Butler and Vale to the use of said defendant Gordon, to the extent of one-half the gross sum awarded to both, to-wit: to eight thousand dollars (\$8,000), and to the further sum of one hundred and fifty dollars (\$150), so advanced as aforesaid to said defendant Gordon, making a total of eight thousand one hundred and fifty dollars (\$8,150); and because he will be remediless in law, and the interposition of this Court of Equity is essential to prevent a multiplicity of suits and irreparable loss, injury and damage to him.

Wherefore, the premises considered, plaintiff prays:

(1.) That the said Hugh H. Gordon, Marion Butler and Josiah M. Vale, individually and as partners in the practice of the law under the firm name and style of Butler and Vale, George B. Cortelyou, Secretary of the Treasury, James R. Garfield, Secretary of the Interior, and Charles H. Treat, Treasurer of the United States of America, be made parties defendant to this Bill of Complaint, and

that the writ of subpoena of the United States of America may issue to them and each of them, commanding them and each of them to appear on a day certain and answer this Bill of Complaint, but without oath, all answers under oath being hereby expressly waived, and to stand and abide by such orders and decrees as the court may from time to time adjudge and enter in the premises.

(2.) That the said defendant Hugh H. Gordon, and his agents, attorneys, and representatives, and each of them, may be enjoined and restrained by the order of this court from applying for or receiving from the United States of America, or any officer of the United States, or from any person or persons, if in his or their possession, any warrant, draft, cheque, money or other evidences of indebtedness, or the proceeds of any warrant, draft, cheque, money or other evidences of indebtedness in settlement of the said award and awards to said defendant Gordon individually, or to or through the said defendants Butler and Vale, or either of them, and from transferring, assigning or encumbering the same pending the final determination of this cause; and that upon the final hearing herein the same may be made permanent.

(3.) That the said defendants Marion Butler and Josiah M. Vale, individually and as partners aforesaid, and their and each of their agents, attorneys and representatives may be enjoined and restrained by the order of this court from collecting or receiving from the United States of America, or any officer thereof, or from any person having the same in possession, and from paying to or delivering to the said defendant Gordon, or to any person for him or for his account, or to any other person, any warrant, draft, cheque or evidence of indebtedness or the proceeds of any warrant, cheque, draft or evidence of indebtedness issued in settlement of the said award and awards to said defendant Gordon or to plaintiff, except as may be directed by this court.

(4.) That the said defendant George B. Cortelyou, Secretary of the Treasury of the United States, may be enjoined and restrained by the order of this court from paying to the said defendants Gordon, Butler and Vale, and to any other person or persons any sum of money in settlement of the said award to the said defendant Gordon, and from signing, approving or allowing any warrant, draft, cheque or other evidence of indebtedness to any one in settlement of the same, and from paying out to any one any portion of the said sum of sixteen thousand dollars (\$16,000), the subject matter of this suit, except as may be directed by this court in furtherance of the objects of this bill.

(5.) That the said defendant James R. Garfield, Secretary of the Interior of the United States may be enjoined and restrained by the order of this court from receiving from the said defendants Gordon, Butler and Vale, and from any other person or persons, a satisfaction or discharge of all or any claim and demand for services rendered to the said Colville Indians in the matter of their said claim hereinabove set forth, except as may be directed by this court.

(6.) That the said defendant Charles H. Treat, Treasurer of the United States may be enjoined and restrained by the order of this

court from issuing or delivering to the said defendants Gordon, Butler and Vale, and to any other person or persons, any warrant, draft, cheque, or other evidence of indebtedness or money in settlement of the said award to the said defendant Gordon, except as may be specifically ordered by the court in furtherance of the objects of this suit.

(7.) That the said defendants Marion Butler and Josiah M. Vale, individually and as co-partners in law under the firm name and style of Butler and Vale may by the order and decree of this court be adjudged to have no title or interest in or to any part of the sum and sums so as aforesaid awarded to plaintiff and to said defendant Gordon, and that they and each of them may be ordered to do and perform any and all acts proper and necessary to enable the same to be transferred to, deposited in and duly distributed by this court as herein prayed, and further abide the order of the court in the premises.

(8.) That a receiver or receivers may be appointed by this court, according to the usage, practice and rules thereof, to collect, take and receive from the Treasurer of the United States of America, and from any officer or person having custody thereof the amount of said award or awards, or any warrant, draft, cheque or money derived from any warrant, draft, cheque or other evidence of indebtedness issued or to be issued by the United States in payment and settlement of the said award and awards to the said defendant Hugh H. Gordon, and to the said defendants Marion Butler and Josiah M. Vale to the use of the said defendant Gordon, and to plaintiff, and either and all of them, and to dispose of and account for said warrant or warrants, draft or drafts, cheque or cheques, evidences of indebtedness or money, as this court may herein-after direct.

(9.) That plaintiff may be adjudged to have a just and equitable lien upon and interest and ownership in the said awards to himself and to said defendant Gordon, and in and to the fund derived or to be derived from any warrant, draft, cheque or other evidence of indebtedness issued or to be issued in payment of the said award and awards to the extent of eight thousand one hundred and fifty dollars (\$8,150), and to the like extent upon the aforesaid trust fund in the Treasury of the United States subject to the payment of said award and awards, and that the receiver or receiver hereafter to be appointed by this court be directed, after the payment of the costs of this suit to pay the said sum of eight thousand one hundred and fifty dollars (\$8,150), to plaintiff, and to distribute and pay out the balance of the said fund as to equity and good conscience may seem fit, and this court may order and direct.

(10.) And plaintiff prays for such other and further relief as shall be meet and agreeable to equity, and for costs of suit.

F. C. ROBERTSON, *Plaintiff.*

GEO. H. PATRICK,

*Solicitors for Plaintiff.*

UNITED STATES OF AMERICA,

*Eastern District of Washington, ss:*

I, Frederick C. Robertson, the plaintiff therein, do solemnly swear that I have read the foregoing Bill of Complaint by me subscribed, and know the contents thereof, and that the facts therein stated upon my personal knowledge are true, and those stated upon information and belief I believe to be true.

FREDERICK C. ROBERTSON.

Subscribed and sworn to before me, by Frederick C. Robertson, to me well known, at Spokane, Washington, this 15th day of August, in the year of our Lord one thousand nine hundred and eight.

[SEAL.]

J. W. MARSHALL,

*United States Commissioner in and for the  
Eastern District of Washington, Duly Appointed,  
Qualified, and Acting.*

PLAINTIFF'S EXHIBIT "A."

Copy.

SPOKANE, WASHINGTON, August 15th, 1908.

SIR: You will please take notice of my claim and lien upon the fund set aside and held in the Treasury of the United States for the benefit of the Indians residing on the Colville Reservation, in the State of Washington, created by the Act of Congress of June 21, 1906 (34 Stats., 325), in payment for one million five hundred thousand acres of land opened to settlement by the Act of July 1st, 14 1892, particularly upon the sums of \$60,000 awarded by the judgment and decree of the Court of Claims under date May 25, 1908, in the suit No. 29526, entitled Marion Butler and Josiah M. Vale (Butler and Vale), against the United States and the Indians residing on the Colville Reservation, to the attorneys who had performed services as counsel on behalf of the said Indians in the prosecution of their claims for payment for the said land and upon the sum of \$14,000 awarded specifically to Hugh H. Gordon, and of \$2,000 awarded specifically to Frederick C. Robertson, the undersigned—to the extent of \$8,150 upon all said sum and sums; and I hereby apply to receive and draw the whole of said award and awards to which I hereby claim to be entitled, and notify you to refuse to permit any other person or persons to receive or draw from the Treasury any part of the sum and sums so as aforesaid claimed by me, unless and except as may be directed by the order of the Supreme Court of the District of Columbia, in proceedings duly instituted therein, or this notice and request shall be withdrawn agreeably to the parties.

Very respectfully,

FREDERICK C. ROBERTSON, *Claimant.*

Hon. George B. Cortelyou, Secretary of the Treasury, Washington,  
D. C.

## PLAINTIFF'S EXHIBIT "B."

Copy.

SPOKANE, WASHINGTON, *August 15th, 1908.*

SIR: You will please take notice of my claim and lien upon the fund set aside and held in the Treasury of the United States for the benefit of the Indians residing on the Colville Reservation, in the State of Washington, created by the Act of Congress of June 21, 1906 (34 Stats., 325), in payment for one million five hundred thousand acres of land opened to settlement by the Act of July 1st, 1892, particularly upon the sums of \$60,000 awarded by the judgment and decree of the Court of Claims, under date May 25, 1908, in the suit No. 29526, entitled Marion Butler and Josiah M. Vale (Butler and Vale), against the United States and the Indians residing on the Colville Reservation, to the attorneys who had performed services as counsel on behalf of the said Indians in the prosecution of their claims for payment for the said land and upon the sum of \$14,000 awarded specifically to Hugh H. Gordon, and of \$2,000 awarded specifically to Frederick C. Robertson, the undersigned—to the extent of \$8,150 upon all said sum and sums; and I hereby apply to receive and draw the whole of said award and awards to which I hereby claim to be entitled, and notify you to refuse to permit any other person or persons to receive or draw from the Treasury any part of the sum and sums so as aforesaid claimed by me, and further I request you to receive from me a satisfaction and discharge of all and any claim and demand for services rendered to the said  
15 Colville Indians in the matter of their said claim, and to refuse to receive such satisfaction and discharge as to the sum and sums awarded to the said Gordon and myself, as aforesaid, from any other person or persons, unless and except as may be directed by the order of the Supreme Court of the District of Columbia, in proceedings duly instituted therein, or this notice and request shall be withdrawn agreeably to the parties.

Very respectfully,

FREDERICK C. ROBERTSON, *Claimant.*

Hon. James R. Garfield, Secretary of the Interior, Washington,  
D. C.

## PLAINTIFF'S EXHIBIT "C."

Copy.

SPOKANE, WASHINGTON, *August 15th, 1908.*

SIR: You will please take notice of my claim and lien upon the fund set aside and held in the Treasury of the United States for the benefit of the Indians residing on the Colville Reservation, in the State of Washington, created by the Act of Congress of June 21, 1906 (34 Stats., 325), in payment of one million five hundred thou-

sand acres of land opened to settlement by the Act of July 1st, 1892, particularly upon the sums of \$60,000 awarded by the judgment and decree of the Court of Claims under date May 25, 1908, in the suit No. 29526, entitled Marion Butler and Josiah M. Vale (Butler and Vale), against the United States and the Indians residing on the Colville Reservation, to the attorneys who had performed services as counsel on behalf of the said Indians in the prosecution of their claims for payment for the said land and upon the sum of \$14,000 awarded specifically to Hugh H. Gordon, and of \$2,000 awarded specifically to Frederick C. Robertson, the undersigned,—to the extent of \$8,150 upon all said sum and sums; and I hereby apply to receive and draw the whole of said award and awards to which I hereby claim to be entitled, and notify you to refuse to permit any other person or persons to receive or draw from the Treasury any part of the sum and sums so as aforesaid claimed by me, and further notify you not to issue or deliver to said Gordon, or to said Butler and Vale to his use, or to any other person or persons, any warrant, draft, cheque, or other evidence of indebtedness or money in settlement of the said award to said Gordon, or to myself, unless and except as may be ordered and directed by the order of the Supreme Court of the District of Columbia, in proceedings duly instituted therein, or this notice and request shall be withdrawn agreeably to the parties.

Very respectfully,

FREDERICK C. ROBERTSON, *Claimant.*

Hon. Charles H. Treat, Treasurer, of the United States of America,  
Washington.

16

*Subpoena to Answer.*

Issued August 26, 1908.

In the Supreme Court of the District of Columbia.

No. 28006. Equity Docket.

FREDERICK C. ROBERTSON, Complainant,  
against

HUGH H. GORDON, MARION BUTLER, JOSIAH M. VALE (Butler and Vale), George B. Cortelyou, Secretary of the Treasury; James R. Garfield, Secretary of the Interior; Charles H. Treat, Treasurer of the United States of America, Defendants.

The President of the United States to Hugh H. Gordon, Marion Butler, Josiah M. Vale (Butler and Vale), George B. Cortelyou, Secretary of the Treasurer; James R. Garfield, Secretary of the Interior; Charles H. Treat, Treasurer of the United States of America, Defendants:

You are hereby commanded to appear in this Court, at its first Special Term, occurring ten days after service of this subpoena, ex-

clusive of Sundays and legal holidays and answer the exigency of the plaintiff's Bill, under pain of attachment, and such other process of contempt as the Court shall award.

Witness, the Honorable Harry M. Clabaugh, Chief Justice of said Court, the 26<sup>th</sup> day of August, A. D. 1908.

[SEAL.]

JOHN R. YOUNG, *Clerk,*  
By F. E. CUNNINGHAM,  
*Assistant Clerk.*

MEMORANDUM.—That the defendants, herewith served, are to enter their appearance in this suit, in the Clerk's Office, on or before the day at which this writ is returnable; otherwise the bill may be taken for confessed.

*Restraining Order.*

Upon the Complainant Filing Undertaking as Required by Equity Rule 42.

The Defendants are hereby restrained as prayed in the within-mentioned bill, until further order, to be made, if at all, after a hearing, which is fixed for the 28th day of August, 1908, of which take notice.

By the Court:

WENDELL P. STAFFORD, *Justice.*

17

*Marshal's Return.*

Summoned defendants and served each of them with a copy of the restraining order in this cause as follows:

Hugh H. Gordon, Charles H. Treat, Treasurer of U. S. personally.

George B. Cortelyou, Secretary of the Treasury by service on Beekman Winthrop acting Secretary, James R. Garfield, Secretary of the Interior by service on Jesse E. Wilson acting Secretary Aug. 26, 1908.

Josiah M. Vale personally Aug. 27, 1908.

Marion Butler personally Aug. 28, 1908.

AULICK PALMER, *Marshal.*  
H.

18

*Order for Injunction.*

Filed Sep. 2, 1908.

In the Supreme Court of the District of Columbia, Holding in  
Equity.

No. 28006.

F. C. ROBERTSON, Plaintiff,  
against

HUGH H. GORDON, MARION BUTLER and JOSIAH M. VALE, Individually and as Partners under the Firm Name and Style of Butler and Vale; George B. Cortelyou, Secretary of the Treasury; James R. Garfield, Secretary of the Interior; Charles H. Treat, Treasurer of the United States of America, Defendants.

Upon consideration of the bill of complaint and the accompanying exhibits filed August 25th, 1908, and the matters and things objected by defendants, and the same having been fully argued by counsel and being understood by the Court, on this second day of September, one thousand nine hundred and eight, to which the rule to show cause against the issue of an injunction herein has been duly continued, it is ordered: That said defendants, Hugh H. Gordon, Marion Butler and Josiah M. Vale, individually and as partners under the firm name and style of Butler and Vale, their and each of their agents, attorneys and representatives, be and they are hereby enjoined and restrained from applying for, receipting to, or collecting from the Government or Treasury of the United States of America, or from any person or persons, any draft, warrant, cheque evidence of indebtedness or money, or the proceeds of any draft, warrant, cheque or evidence of indebtedness issued or to be issued by the Treasurer or Treasury Department of The United States of America, in the name of or to the use of said Defendant Hugh H. Gordon and said plaintiff Frederick C. Robertson, in settlement or satisfaction of the award and awards, judgment, decree and findings made by the Honorable the Court of Claims of the United States on

May 25th, 1908, in the case of said defendants Marion Butler  
19 and Josiah M. Vale (Butler and Vale), against the United

States of America and the Indians on the Colville Reservation, in the State of Washington, as set out in the Bill of Complaint herein, and said defendant Gordon further from assigning, transferring or encumbering any portion of the sum of sixteen thousand dollars set out in the Bill of Complaint as awarded to said defendant Gordon and said plaintiff Robertson, the subject matter of this controversy, claimed by said plaintiff;

Said injunction to be issued upon plaintiff's complying with Equity Rule No. 42.

In open court.

WENDELL P. STAFFORD, *Justice.*

20        *Motion to Consolidate with Equity No. 28005.*

Filed Nov. 2, 1908.

In the Supreme Court of the District of Columbia, Holding an  
Equity Court.

Equity. No. 28006.

FREDERICK C. ROBERTSON, Complainant,

vs.

HUGH H. GORDON et al.

Now comes the defendant Charles H. Treat, Treasurer of the United States by Daniel W. Baker, United States Attorney, and moves the Court to consolidate this cause with Equity No. 28005, for the following grounds:

1. That the subject matter of this suit is the same as the subject matter of Equity No. 28005, except that the fund is claimed in this suit by a different person than it is claimed by in Equity No. 28005. And that complainant is entitled to the sum of \$2,000.00 as awarded by Court of Claims.

2. That the causes should be consolidated for the reason that receivers have been appointed in Equity No. 28005 and that the defendants in Equity No. 28005 have been enjoined from obtaining from the Treasurer of the United States the sum of money ordered to be paid to the receivers in Equity No. 28005.

3. That the said sum of money ordered to be paid to the receivers in Equity No. 28005, if paid thereto by the Treasurer of the United States, the common defendant in the said several suits, might be distributed free from any right, title or interest that complainant in Equity No. 28006 may have.

21        Therefore, the defendant moves the Court to consolidate this cause with Equity No. 28005.

DANIEL W. BAKER,  
*U. S. Atty.*

George H. Patrick, Esquire, Attorney for Complainant:

Please take notice that this motion will be called to the attention of the Court on Monday, November 2, 1908, at ten o'clock A. M.

DANIEL W. BAKER.

*Order Consolidating Causes, &c.*

Filed November 2, 1898.

In the Supreme Court of the District of Columbia, Holding in  
Equity.

(No. 28000.)

INDIAN PROTECTIVE ASSOCIATION, Plaintiff,  
againstCHARLES H. TREAT, Treasurer of the United States; HUGH H.  
Gordon, Benjamin Miller, Administrator of the Estate of Levi  
Maish, Deceased, Defendants.

(No. 28005.)

RICHARD D. GWYDIR, J. W. EDWARDS, WENDELL HALL, Plaintiffs,  
againstCHARLES H. TREAT, Treasurer of the United States; HUGH H.  
Gordon, Benjamin Miller, Administrator of the Estate of Levi  
Maish, Deceased, Defendants.

(No. 28006.)

FREDERICK C. ROBERTSON, Plaintiff,  
againstHUGH H. GORDON, MARION BUTLER, and JOSIAH M. VALE, Individ-  
ually and as Partners under the Firm Name and Style of Butler  
and Vale; George B. Cortelyou, Secretary of the Treasury; James  
R. Garfield, Secretary of the Interior; Charles H. Treat, Treasurer  
of the United States of America, Defendants.

It being suggested to the Court by Daniel W. Baker, Esquire, Attorney of the United States of America, solicitor for defendants common to all the above entitled causes, that the said causes are of a like nature and relative to the same questions, and are now pending in this court;

Upon his motion, Messrs. Charles Poe and George H. Patrick, solicitors respectively for the plaintiffs in all said causes being present and assenting thereto, and the matter being understood by the Court, to avoid costs and delay in the administration of justice, and in the interest of equitable proceedings conformably to the usages of the court, the same appearing reasonable, on this second day of November, one thousand nine hundred and eight,

23 It is ordered, That the said several causes set out in the caption hereof be and they hereby are consolidated into one cause to be considered and heard under the number 28005.

It is further ordered, upon motion of George H. Patrick, solicitor for Frederick C. Robertson, plaintiff in cause No. 28006, original, that Charles Poe, James B. Archer and Nathaniel S. Fauett, be and they hereby are appointed receivers of this Court in the said cause, as consolidated, with full power and authority to demand and receive from the United States of America, or the Treasurer thereof,

the sum of twenty-two thousand dollars, to-wit: the several sums of fourteen thousand dollars (\$14,000), awarded to Hugh H. Gordon, six thousand dollars (\$3,000, awarded to Benjamin Miller, administrator of Levi Maish, deceased, and two thousand dollars (\$2,000), awarded to Frederick C. Robertson, by the judgment and decree of the Court of Claims of the United States of America, on March 25, 1908, in the case entitled Butler and Vale (Marion Butler and Josiah M. Vale) against the United States and the Indians residing on the Colville Reservation, No. 29526, in the said court.

It is further ordered, That the title to the said sum and sums of money is hereby vested in the said receivers, for the benefit of whomsoever the Court shall hereafter adjudge entitled to the same; and the said receivers are also authorized, and directed to receive from the United States of America, or the Treasurer thereof, or any other officer authorized to deliver the same, any and all cheques, drafts, warrants, or other evidences of indebtedness issued or to be issued in payment of the said sum and sums of money, and any and all sum and sums of money due and to be paid in settlement and satisfaction of said award and awards as aforesaid.

It is further ordered, That before demanding or receiving the said sum and sums of money, cheques, drafts, warrants, or other evidences of indebtedness, or any part thereof, the said receivers shall give a bond payable to the United States of America, in the penal sum of twenty-five thousand dollars (\$25,000), conditioned for the faithful discharge of their duties as such receivers under this and all further orders of this Court to be made in this cause as consolidated.

It is further ordered, That upon the payment of the said money to the said Receivers, the said bills in Equity No. 28005, No. 28000, and No. 28003, shall stand dismissed as to the defendant Charles H. Treat, Treasurer of the United States, and the said bill in Equity No. 28003 shall stand dismissed as to the defendants George B. Cortelyou, Secretary of the Treasury and James R. Garfield, Secretary of the Interior, the same being without costs to any of the said defendants.

JOB BARNARD, *Justice.*

24        *Separate Answer of Defendant Hugh H. Gordon.*

Filed Nov. 2, 1908.

In the Supreme Court of the District of Columbia, Holding an  
Equity Court.

Equity. No. 28006.

F. C. ROBERTSON, Complainant,  
vs.

CHAS. H. TREAT, Treasurer of the United States, and HUGH H.  
GORDON et al., Defendants.

1-2-3.

Defendant Gordon admits the allegations in paragraphs, 1, 2 and 3 of the bill.

## 4.

Defendant Gordon admits that said Maish and Gordon contract contained a stipulation that it was to remain in force for a term of ten years from date of approval, as alleged in paragraph 4 of said bill; but the defendant avers that the Court of Claims in its decree rendered May 25, 1906, declared that said contract expired July 25, 1904. Defendant denies that said Court of Claims made said contract a guide in determining the amount of compensation to be paid attorneys representing said Indians in the prosecution of their said claim; but on the contrary avers that said court determined and adjudged the amount of compensation, to be paid each attorney, solely upon a *quantum meruit* valuation of each attorney's individual services. (A copy of said decree of the Court of Claims is filed herewith, marked "Exhibit A" and made part of this answer.)

## 5.

Defendant Gordon denies the allegation in paragraph 5 of said bill, that Maish and Gordon jointly employed plaintiff or made any agreement of any character with plaintiff. Maish died in February, 1899, five years before defendant ever heard of plaintiff; nor does defendant believe that Maish ever heard of plaintiff.

Defendant Gordon denies that he ever made or even contemplated making any agreement either written or verbal, with plaintiff as to any matter relating to the claim of the Colville Indians which did not contemplate and have for its sole basis the securing of a new contract with said Indians by plaintiff Robertson and R. D. Gwydir of Spokane Washington. Defendant also denies that plaintiff was employed by defendant in 1903 or 1904 under the Maish and Gordon contract as alleged and denies that plaintiff has shown or can show any proof whatever of such employment.

And defendant avers as to the agreement of March 28, 1906 upon which plaintiff's suit is brought, that the failure of said agreement to expressly stipulate that plaintiff and Gwydir were to secure said new contract with said Indians, is explained by the fact that said agreement of March 28, 1906, was merely supplemental to a prior agreement already made by defendant with plaintiff and Gwydir, through correspondence with Gwydir and plaintiff; and that in said prior agreement, plaintiff and Gwydir were already obligated to secure new contract with said Indians.

26 & 27 And defendant avers that the existence and nature of said prior agreement is evidenced by a letter from plaintiff to defendant, dated May 9, 1904, marked Exhibit B" and herein set forth, in which plaintiff assumes the obligation to secure with aid of said Gwydir the said new contract with said Indians.

**"EXHIBIT B."**

Robertson, Miller and Rosenhaupt, Lawyers.

SPOKANE, WASH., May 9, 1904.

Hugh H. Gordon, Esq., Miami, Fla.

DEAR SIR: Major Gwydir, an old and warm personal friend of mine has placed before me certain correspondence and documents transmitted to him by you and under your direction. I may say that I was assistant U. S. Attorney under Cleveland, and am reasonably familiar with the Indians on the Colville Reservation and conditions there, and Major Gwydir has asked me to assist him in the matter. He is well thought of by the Indians, and a thoroughly capable man to carry out what he undertakes. I however, desire you to understand that whatever I do in the premises is with the assistance and under the agreement with Major Gwydir and yourself, and therefore you can write me fully and confidentially, as we will both take up the letter at this end. Major Anderson, the Indian Agent on the Colville Reservation was lately removed, and there is no agent now on the Reservation. It might therefore be important that you should be informed of this fact, as, if the contract was accepted, it would probably be at once referred to Washington before it was approved by the special Agent here, who I assume has no authority. You will remember that in 1892 the north half of the Colville Reservation was thrown open to allotment, and in 1896 it was generally thrown open to be entered under the general land laws of the United States, and I am not prepared now to know exactly what is the status of the Indian Claims. It having been previously my understanding that when the Reservation was thrown open in 1892 and 1896, without any Congressional Act giving to the Indians anything, so far as I know, that this settled their rights, and was a repudiation of any treaty right, on the

28 ground that the land originally placed in this reservation by

executive order did not belong to any tribe of Indians and therefore no treaty was necessary, either to create the reservation, or to authorize its return to the public domain free from any claim on the part of the Indians. Of course I do not want to discredit anything since this claim seems to be well founded, but I desire to get your understanding of the law applicable to it with a view of getting as advantageous a contract as possible, and also, if possible, in determining the value of this claim and in explaining what has been done and what remains to be done. I presume you are thoroughly familiar with all the facts, and can give me information with reference to all legislative action had, and whether or not this is considered an action that can be established in a Court of Claims without Congressional action, and what else you deem to be of importance here, and whether or not Major Gwydir and myself, you also to be mentioned if you desire, should not be authorized in the first instance by the Indian Department to secure the contract, subject to the approval of the Indian Department. Had we a

friend on the reservation as Major Anderson was, we could take this matter up directly here, but this agent would probably report any attempt to take the contract now direct to Washington, under the circumstances of the case. Even if any person were sent here I feel confident with the acquaintance Major Gwydir has and the acquaintance that I have with the Indians, that I can fairly assure you that no contract could be obtained here without fully protecting your interests in the premises. I will have the proper contracts made, and should endeavor to have the Major prepared to go to the reservation at any time; and should you desire to wire us, you may do so. You can understand that a contract of this kind requires considerable labor and time in getting the Indians together, hence we would like to understand the conditions so as to answer the questions of the Indians that they would be apt to ask. I can probably obtain the information asked by personal investigation from the statutes, but as to the conditions and status of this litigation I would have to obtain it from yourself and associates.

Major Gwydir will write you today, explaining to you fully.

Very respectfully,

F. C. ROBERTSON.

Dict. F. C. R.

Defendant further avers that the securing of the said new contract with the Indians was to be the consideration for plaintiff's and Gwydir's interest in any fee secured by prosecuting the claim of said Indians under said new contract; and that the amount of said interest, which plaintiff (representing himself and said Gwydir) was to receive, was more clearly defined and specified in said subsequent and supplemental agreement of March 28, 1906, upon which

29 plaintiff now sues.

As said obligation of plaintiff to secure said new contract with said Indians was the sole basis upon which defendant had ever had any relation whatever with plaintiff, it was not deemed necessary by defendant to insist that said stipulation, as to securing the new contract with the Indians, be repeated in this supplemental agreement of March 28, 1906 which was drawn up by plaintiff. But the spirit and intent of said supplemental agreement was that Robertson and Gwydir were to undertake (as they had already agreed) to secure said new contract with the Indians, and that if said new contract was secured, then, and only on such condition, Robertson and Gwydir were to be entitled to share with Gordon any compensation received, whether under said new contract or under the expired Maish and Gordon contract or from any other source whatsoever, as set forth in said supplemental agreement.

Defendant further avers that although express stipulation that plaintiff and Gwydir were to secure said new contract with the Indians is not repeated in said supplemental agreement of March 28, 1906; yet that this supplemental agreement represented a new deal independent of the old status under the Maish and Gordon contract and was a separate and exclusive arrangement between Gordon, Gwydir and Robertson logically consistent with, and sup-

plemental to, the prior agreement between them, is clearly shown by a phrase in the agreement itself, where plaintiff agrees (out of the contingent interest assigned by Gordon) to take care of Gwydir only; and said separate and exclusive arrangement between Gordon, Gwydir and Robertson only, is also shown by the wording of the receipt for \$150 set forth in paragraph 5 of plaintiff's bill.

30 And defendant avers that such exclusive arrangement (shown as aforesaid by said phrase and said receipt) embodied the obligation upon plaintiff and Gwydir to secure new contract with said Indians, as has been shown by plaintiff's letter hereinbefore set forth and now further shown by letters from Gwydir and plaintiff here set forth and marked "Exhibits "C and D" respectively and made a part of this answer. (The originals of said letters will be produced in court at the hearing and are now subject to plaintiff's inspection.)

#### EXHIBIT "C."

SPOKANE, WASH., April 25, 1904.

Major Hugh H. Gordon, Biscayne, Fla.

My DEAR GORDON: Your telegram of the 23rd received in due time, but your letter of the 16th reached me 24th mails having been delayed by washouts etc. Anderson the Indian Agent upon whom I depended for considerable help has been removed from office, and I will have to see if he will go into the matter fully with me. I will see him in three or four days, and will know positively. I will wait until I receive the copies you mentioned in your telegram. A letter from the Indian Office would be of the greatest benefit, but if it cannot be had we must do the work without it but I do regret that we did not get to work before the agent's removal. As a general fact delays are dangerous, but in this case it has been special.

Yours in haste,

R. D. GWYDIR.

31 Defendant admits that the claim of said Indians was presented and that the appropriation act and other acts cited by plaintiff in paragraph 6 of the bill, were passed; but he denies that the sum of \$60,000 awarded by the Court of Claims to attorneys, is liable to be paid out to said Indians; said sum having been set aside by the Treasury Department for the payment of said award, as provided by the act of Congress.

#### 7.

Defendant admits the allegations in first clause of paragraph 7 of said bill, as to the proceedings in the Court of Claims and as to the citations of the decree of said Court; but he denies the allegation in concluding clause of said paragraph 7 (erroneously marked 9) that the total sum of \$60,000 awarded, is liable to be drawn from the Treasury by Butler & Vale, and also denies that the withdrawal by Defendant of the \$14,000 awarded to defendant would in any way injure plaintiff or that plaintiff has any claim against defendant.

## 8.

Defendant denies the allegation, in paragraph 8 of said bill, that the services rendered by plaintiff were "extensive laborious and important", and defendant also denies all allegations, in said paragraph, which set up any claim whatever to any part of the \$14,000 awarded to defendant.

## 9.

Defendant has no personal knowledge as to the notices alleged, in paragraph 9 of said bill, to have been sent to department officials and he neither admits nor denies said allegations; but defendant denies all allegations in said paragraph 9 which in any way set up a claim to any part of the \$14,000 awarded to defendant.

32

## 10.

Defendant admits the allegation, in paragraph 10 of said bill, that, should defendant secure possession of the \$14,000 awarded to defendant, he would remove the same from the jurisdiction of this Court; but denies that such removal would in any way injure plaintiff, inasmuch as plaintiff has no claim whatever against defendant.

Defendant admits that he has no property in the District of Columbia, but denies that this fact in any way affects the interest of plaintiff. Defendant also denies the allegation in said paragraph 10 made "upon information and belief" that defendant has no property elsewhere sufficient to meet said award, or the part thereof claimed by plaintiff; and defendant also denies that plaintiff has any lien or ownership in said \$14,000 awarded to defendant.

Answering generally defendant denies that plaintiff has any claim upon defendant; for that the said new contract with said Indians never having been secured, the agreement of March 28, 1906, upon which plaintiff sues, is void for want of consideration; inasmuch as, at that date, there was no possible way (other than by securing said new contract with said Indians) in which plaintiff could have rendered any service which would warrant the claim for one-half of defendant's interest or for any part thereof; and defendant avers that after the date of said agreement of March 28, 1906, defendant could not have rendered and did not render any service whatever either to defendant or to said Indians, as is clearly shown by the decision of the Court of Claims filed herewith and also by the

33 sworn testimony of plaintiff himself taken September 27, 1906, in the case then pending in the Court of Claims.

(A copy of said testimony being a part of the Record in the Case before the Court of Claims is filed herewith marked, "Exhibit E" and made a part of this answer.)

Defendant therefore avers that the consideration for any claim of plaintiff upon defendant has totally failed.

Defendant further answering denies that plaintiff has any claim against defendant for the further reason that plaintiff's said testimony was given for use in the case then pending before the Court of Claims; that plaintiff's deposition was taken for the purpose of attempting to set forth alleged services for which he claimed com-

pensation at the hands of said Court; that he thereby became a party to said suit, and that his failure to appear by intervention, did not destroy his status as a party; that notwithstanding his failure to intervene, he was recognized and dealt with as a party by said court; that in his said testimony plaintiff set up his alleged claim for the one-half of defendant's interest for which he now sues; that his alleged claim for one-half of defendant's interest was before said Court in its deliberations; and that plaintiff having submitted himself to the jurisdiction of that court, is bound by its decrees and the matter is *res judicata*.

Wherefor, defendant Gordon prays that the bill may be dismissed, and that a decree may be rendered for his costs herein and for such other relief as the court may deem just and proper.

HUGH H. GORDON.

I, Hugh H. Gordon, on oath state that I have read the foregoing answer and know the contents thereof; that the facts stated upon my personal knowledge are true and those stated upon information and belief, I believe to be true.

HUGH H. GORDON.

Sworn to and subscribed before me this 2nd day of Nov. 1908.

J. R. YOUNG, *Ct<sup>k</sup>.*  
By F. E. CUNNINGHAM,  
*Asst Ct<sup>k</sup>.*

35      *Exceptions of Frederick C. Robertson to Answer of Hugh H. Gordon.*

Filed Nov. 13, 1908.

In the Supreme Court of the District of Columbia, Holding an Equity Court.

Consolidated No. 28005. Original No. 28006.

FREDERICK C. ROBERTSON and Others, Plaintiffs,  
vs.  
HUGH H. GORDON and Others, Defendants.

Exceptions taken by the above named Robertson to the answer of the defendant Gordon heretofore, to-wit: on November 2nd, 1908, filed in original cause numbered 28006, in the aforesaid court, for impertinence and insufficiency.

First Exception: For that the said defendant has not in and by the fourth paragraph of his said answer, according to the best of his knowledge, remembrance, information and belief set forth either a confession or denial of the allegations of the fourth paragraph of plaintiff's bill of complaint herein:

"that the said contract (between Maish and Gordon and the Colville Indians), was impliedly continued in force, and is yet in full

force and effect by virtue of the continued service thereunder, recognized, acquiesced in and confirmed by the United States of America, trustee for the said Colville Indians then and now, and by the said Colville Indians, and by the Congress of the United States of America, and accepted by said Maish and Gordon, and by those claiming by, through and under them, or rendering service to the said Colville Indians which resulted in the prosecution and collection of the said claims in full, including plaintiff and said defendants Gordon, Butler and Vale, to the extent that the said contract was held and considered an element in determining the amount of compensation for such services, and for all services rendered by the said and all other attorneys, in the said matter, as will herein-after more fully appear."

wherefore, the aforesaid answer is insufficient.

And said plaintiff further excepts, for impertinence to all reference in said paragraph of said answer to the Court of Claims and its decisions respecting said contract, and the method of determining the amount of compensation to be paid to each attorney, and to the alleged copy of the decree of the said Court of Claims, marked Exhibit A, to said answer; and that the same is irrelevant and irresponsive.

Second Exception: For that said defendant Gordon has not in and by the fifth paragraph of his said answer, in manner aforesaid, answered and set forth whether

"in consideration of the assistance which plaintiff agreed to and did furnish to him, the said defendant Gordon agreed to an' did admit plaintiff to an equal copartnership and share with him therein, and agreed that plaintiff should be paid and receive certain compensation, which arrangements were afterwards adjudged, settled and reduced to writing between them in the City of Washington, District of Columbia,"

as set forth in the said bill of complaint, in the instrument 37 of writing bearing date, March 28, 1906: wherefore, plaintiff excepts to the same for insufficiency.

And plaintiff further excepts, for impertinence, to said fifth paragraph of the aforesaid answer, wherein

"Defendant denies that plaintiff was employed by defendant in 1903 or 1904 under the Maish and Gordon contract as alleged, and denies that plaintiff was shown or can show any proof whatever of such employment,"

the same being irrelevant and irresponsive to anything alleged in the said bill of complaint, and constituting no valid defense to this action.

And plaintiff further excepts for impertinence, to the said fifth paragraph of the aforesaid answer wherein said defendant Gordon avers that plaintiff's suit is brought upon the agreement of March 28, 1906, the same being irrelevant and irresponsive to anything alleged in the said bill of complaint, and constituting no valid defense to this action.

And plaintiff further excepts for impertinence, to the said fifth

paragraph of the aforesaid answer of defendant Gordon, wherein he "avers that the existence and nature of said prior agreement is evidenced by a letter from plaintiff to defendant, dated May 9, 1904, marked Exhibit B",

the said alleged prior agreement not having been shown, and there being nowhere in the aforesaid answer an averment of the fact of the execution of said prior agreement, nor reference in any way to its date, the place where it may have been executed, or anything whereby it might be identified.

38 And plaintiff further excepts for insufficiency, to the said fifth paragraph of the aforesaid answer, for that the defendant Gordon has not in manner and form answered and set forth whether or not he made and executed the paper writing, bearing date March 28, 1908, purporting to be signed by plaintiff and defendant, set forth in the fifth paragraph of the said bill of complaint herein.

And plaintiff further excepts, for impertinence, to the said fifth paragraph of the aforesaid answer, in that all reference therein to any supplemental agreement of March 28, 1908, or other date, and to any prior agreement is irrelevant and irresponsible to anything alleged in plaintiff's said bill of complaint, there being no affirmative averment in the said answer of the fact or particulars of such prior agreement.

Third Exception: For that the said defendant Gordon has not in and by the eighth paragraph of his said answer, in manner aforesaid, answered and set forth whether he confesses or denies the allegations in the eighth paragraph of plaintiff's bill of complaint, except that he

"denies that the services rendered by plaintiff were 'extensive, laborious and important' and the allegations in said paragraph which set up any claim whatever to any part of the \$14,000 awarded to defendant,"

wherefore, said answer is insufficient.

Fourth Exception: For that the said Defendant Gordon has not in and by the ninth paragraph of his said answer, in manner aforesaid, answered and set forth whether he confesses or denies 39 the allegations in the ninth paragraph of plaintiff's bill of complaint, except that he

denies all knowledge of the notices therein set forth "and all allegations in said paragraph 9 which in any way set up a claim to any part of the \$14000 awarded to defendant."

Fifth Exception: Plaintiff excepts for impertinence, to the paragraph in said defendant Gordon's answer, in manner aforesaid:

"Answering generally, defendant denies that plaintiff has any claim upon defendant, for that the said new contract with said Indians never having been secured, the agreement of March 28, 1906, upon which plaintiff sues, is void for want of consideration, inasmuch as, at that date, there was no possible way (other than by securing said new contract with said Indians), in which plaintiff could have rendered any service which would warrant the claim for

one-half of defendant's interest or for any part thereof; and defendant avers that after the date of said agreement of March 28, 1906, defendant could not have rendered and did not render any service whatever either to defendant or to said Indians, as is clearly shown by the decision of the Court of Claims filed herewith, and also by the sworn testimony of plaintiff himself taken September 27, 1906, in the case then pending in the Court of Claims. (A copy of said testimony, being a part of the Record in the case before the Court of Claims, is filed herewith, marked Exhibit E, and made a part of this answer); the aforesaid paragraph of said answer so excepted to being irrelevant and irresponsible to anything alleged in plaintiff's said bill of complaint, is argumentative only, neither stating 40 nor denying any fact, and the averments as to what could not have occurred, even if relevant, being directly contradicted by the confessions in the said answer that nevertheless the said claim of said Colville Indians was in fact collected and paid in full by The United States of America subsequent to March 28, 1906, to wit: on June 21, 1906, as alleged in said bill of complaint, an act of which also this court will take judicial notice.

Sixth Exception: Plaintiff further excepts, for impertinence, to the paragraph in said defendant Gordon's answer:

"Defendant further answering denies that plaintiff has any claim against defendant for the further reason that plaintiff's said testimony was given for use in the case then pending before the Court of Claims; that plaintiff's deposition was taken for the purpose of attempting to set forth alleged services for which he claimed compensation at the hands of said Court; that he thereby became a party to said suit, and that his failure to appear by intervention, did not destroy his status as a party; that notwithstanding his failure to intervene, he was recognized and dealt with as a party by said court; that in his said testimony plaintiff set up his alleged claim for the one-half of defendant's interest for which he now sues; that his alleged claim for one half of defendant's interest was before said court in its deliberations and that plaintiff having submitted himself to the jurisdiction of that court, is bound by its decree and the matter is *res judicata*,"

the same being irrelevant and irresponsible to anything alleged in plaintiff's said bill of complaint, and constituting no valid 41 defense against this action.

Seventh Exception: Plaintiff further excepts, for impertinence, to the concluding prayer "for such other relief as the court may deem just and proper."

In all or some of which particulars the said plaintiff is advised that the said answer of the defendant Gordon is evasive, insufficient and impertinent and ought to be amended, and humbly prays the same may be amended accordingly, and that he, the said defendant Gordon, may be compelled to put in a full and sufficient answer to plaintiff's bill of complaint herein.

FREDERICK C. ROBERTSON,

*Plaintiff.*

By GEO. W. PATRICK, *His Solicitor.*

November 12th, 1908.

42           *Intervening Petition, &c., of Butler and Vale,*

Filed December 22, 1908.

In the Supreme Court of the District of Columbia, Sitting in Equity.

Eq. No. 28005.

RICHARD D. GWYDIR, J. W. EDWARDS, and WENDELL HALL, Complainants,

vs.

CHARLES H. TREAT, Treasurer of the United States; HUGH H. Gordon, and Benjamin Miller, Administrator of Estate of Levi Maish, Deceased, Defendants.

Consolidated therewith are—

Eq. No. 28000.

INDIAN PROTECTIVE ASSOCIATION, Complainant,

vs.

CHARLES H. TREAT, HUGH H. GORDON, and BENJAMIN MILLER, Administrator, Defendants.

Eq. No. 28001.

INDIAN PROTECTIVE ASSOCIATION, Complainant,

vs.

CHARLES H. TREAT, Treasurer of the United States, and HEBER J. MAY, Defendants.

Eq. No. 28006.

FREDERICK C. ROBERTSON, Complainant,

vs.

HUGH H. GORDON, MARION BUTLER, and JOSIAH M. VALE, Defendants.

Come now Butler & Vale by Marion Butler and Josiah M. Vale,  
co-partners trading and doing business under the firm name  
43 and style of Butler & Vale and by leave of court first had and  
obtained and after consent of all parties in open court file  
this their intervening petitions in Equity Causes Nos. 28005, 28000  
and 28001 and their answer and cross bill in Equity Cause No.  
28006, and, praying that this Honorable Court will treat this, the  
statement of their grievances and appeal for relief, as applicable to  
each and every of the causes consolidated as set forth hereinabove,  
respectfully represent to the Court as follows:

1. That by its certain original bill of complaint in Equity No.  
28000 the Indian Protective Association, a corporation doing busi-  
ness in the District of Columbia, and suing in its own right, prayed

this Honorable Court for an injunction to restrain Charles H. Treat, Treasurer of the United States, from paying and Hugh H. Gordon and Benjamin Miller, Administrator of the Estate of Levi Maish, deceased, from demanding of or receiving from said Treat sums of money of \$14,000 and \$6,000 respectively awarded said Gordon and said Miller respectively, for services to the Colville Indians by a judgment or decree of the Court of Claims of the United States, or what was styled such in said bill of complaint, the said bill of complaint of said Indian Protective Association alleging that it, said Indian Protective Association, had a lien on or was entitled to and should be decreed to have an equitable interest in said sums so awarded as aforesaid to said Hugh H. Gordon and Benjamin Miller, Administrator of the Estate of Levi Maish, deceased, by virtue of certain contracts made by said Hugh H. Gordon as surviving partner of the firm or co-partnership of Maish & Gordon and mesne conveyances of the interests acquired by said contracts by parties transferring and assigning the same to said Indian Protective Association.

2. That by its certain original bill of complaint in Equity No. 28001 the Indian Protective Association, a corporation doing business in the District of Columbia and suing in its own right, prayed this Honorable Court for an injunction to restrain Charles H. Treat, Treasurer of the United States, from paying and Heber J. May from demanding of or receiving from said Treat the sum of three thousand dollars awarded said May for services to the Colville Indians by a judgment or decree of the Court of Claims of the United States or what was styled such in said bill of complaint, the said bill of complaint of said Indian Protective Association alleging that it, said Indian Protective Association, had a lien on or was entitled to and should be decreed to have an equitable interest in and to the entire award aforesaid to said Heber J. May by virtue of certain transfers and assignments made for valuable consideration by said May and thence by mesne conveyances and assignments to said Indian Protective Association.

3. That by their certain original bill of complaint in Equity No. 28005 Richard D. Gwydir, J. W. Edwards and Wendell Hall, residents of the State of Washington suing in their own right, prayed this Honorable Court for an injunction to restrain Charles H. Treat, Treasurer of the United States, from paying and Hugh H. Gordon and Benjamin Miller, Administrator of the Estate of Levi Maish, deceased, from demanding of or receiving from said Treat

44 sums of money of \$14,000 and \$6,000 respectively awarded said Gordon and said Miller respectively, for services to the Colville Indians by a judgment or decree of the Court of Claims of the United States, or what was styled such in said bill of complaint, the said bill of complaint of said Gwydir, Edwards and Hall alleging that they had a lien on and were entitled to and should be decreed to have an equitable interest in said sums so awarded as aforesaid to said Hugh H. Gordon and Benjamin Miller, Administrator of the Estate of Levi Maish, deceased, by virtue of services rendered to said Maish & Gordon in procuring contracts of attorneyship

with the Colville Indians referred to in the name of Maish & Gordon and assignment made by said Maish & Gordon to said Gwydir, Edwards and Hall of a share out of any moneys that said Maish & Gordon or either of them might be awarded for representing said Colville Indians.

4. That by his certain original bill of complaint in Equity No. 28003 Frederick C. Robertson, a resident of the State of Washington, suing in his own right, filed his bill in equity against Hugh H. Gordon in his own right and Marion Butler and Josiah M. Vale in their own right individually and as partners under the firm name and style of Butler & Vale, alleging in and by his said bill of complaint that said Butler & Vale had an indeterminate interest in and control and custody of an award made by the Court of Claims of the United States, or what was alleged in the said bill of complaint of said Robertson to be such, on account of certain legal services rendered by various attorneys at law to the Colville Indians in the matter of a claim for \$1,500,000 against the Government of the United States but that part of said award had been made to said Hugh H. Gordon individually and that in said part so awarded said Gordon said Butler & Vale had no interest except to the use of complainant Robertson and said Gordon, and that by the terms of an agreement between said Robertson and said Gordon said Robertson was entitled to a one-half interest plus \$150 out of the total sum awarded by said Court of Claims to both said Gordon and said Robertson, the sum so awarded said Gordon being fourteen thousand dollars, and the sum awarded said Robertson being two thousand dollars. That in and by his bill of complaint said Robertson prayed this Honorable Court for an injunction against the three defendants named in his said bill of complaint and each of them, that he, said Robertson, be decreed to have an equitable lien on the amount awarded to Hugh H. Gordon as aforesaid and that Butler & Vale be decreed to have no title to or interest in the sums so awarded said Robertson and said Gordon as aforesaid.

5. That the said several causes hereinbefore referred to were by this Honorable Court consolidated as aforesaid, receivers appointed for the several funds the subject matter of complaint in the several suits hereinbefore referred to, the same having been prayed for specifically by the complainants in each and every of the several suits and leave granted by consent of all the parties in open court to Butler & Vale to intervene, answer or file a cross bill or bills in each

cause consolidated as might be appropriated in each separate cause or as they might be advised. That the bill as to  
45 Charles H. Treat was dismissed and the funds turned over to the Receivers, Charles Poe, James B. Archer and Nathan S. Fawcett.

6. That your complainants in this cross bill, answer and intervening petition, namely, Butler & Vale, copartners practicing law under the firm name and style of Butler & Vale, of which said copartnership Marion Butler and Josiah M. Vale are the sole individual members, deny that either any or all of the parties, except themselves, Butler & Vale, to the several suits in equity hereinbefore

referred to, are entitled to have paid to them or any of them the sums of money or any of the sums of money claimed or alleged to be due to them, the several other parties to this consolidated cause, whether by virtue of the award or purported award, judgment or decree of the Court of Claims or by assignments, transfers or conveyances of any part of said award, judgment or decree of the Court of Claims or by assignments, transfers or conveyances of any part of said award, judgment or decree or that either, any or all of the several other parties aforesaid to this consolidated bill in equity have any interest or interests in the award or awards save subject to the rights of your cross complainants and intervenors Butler & Vale and save as your cross complainants and intervenors may justly find to be due them or either or any of them the complainants or defendants to the several original bills of complaint hereinbefore referred to.

7. That your cross complainants and intervenors Butler & Vale are entitled to have the whole of the said several sums mentioned in the several original bills of complaint hereinbefore referred to paid over to them said Butler & Vale to be by them disbursed in accordance with the law of Congress providing for the payment of the claim of the Colville Indians and ascertainment of and distribution to the attorneys securing the payment of said claim to the Indians, after first deducting the cost of prosecution in the Court of Claims, including reasonable attorneys' fees, of the claims of attorneys to compensation and the costs of these proceedings and to have the award, judgment or decree of the Court of Claims purporting to find the several shares of the several claimants to the attorneys' fund or fee and to distribute the same set aside as null and void and in excess of the jurisdiction of said Court of Claims and a judgment and decree entered directing the payment and disbursement to Butler & Vale by the officers of the Treasury of the United States of the entire sum yet undisbursed of the total award made by the Court of Claims to attorneys, as fees for services in representing the Colville Indians and obtaining payment of their claim against the United States by the Government of the United States.

8. That the Colville Indians for many years past had a claim against the United States for \$1,500,000 for the cession of part of the Colville Indian Reservation and employed directly or mediately a number of attorneys at law to prosecute their claim in their behalf before the Congress of the United States, the executive departments or courts thereof on a contingent basis, those employed among others

being the law co-partnership or firms of Maish & Gordon and  
46 Butler & Vale, and Heber J. May, Frederick C. Robertson,

Daniel B. Henderson and others. That your cross complainants and intervenors Butler & Vale took the most active part in prosecution of the claim aforesaid was necessarily chiefly before the Committees of Congress charged with special attention to Indian affairs. That the final provision by Congress for payment of the aforesaid claim of the Colville Indians was due almost solely to the active unremitting efforts of Butler & Vale after Maish & Gordon and most of their

associates had failed and this fact was well known to Congress and the committees thereof. That in consequence thereof Congress as the special and plenary guardian of the Indians and their affairs in providing for payment of the claim of the Colville Indians passed a special jurisdictional act for payment of the fee of the attorneys who had rendered services to said Colville Indians after the said attorneys each and all at the instance of the Committees on Indian Affairs of Congress had agreed among themselves on the basis of division of the total fees to be awarded, conferring jurisdiction on the Court of Claims to ascertain, determine and adjudicate the total fees due by the Indians for services of all attorneys, but directing that the legal proceedings to ascertain the fee due should be in the name of Butler & Vale, that the award or judgment rendered should be rendered in the name of Butler & Vale, that the said award or judgment should be paid to Butler & Vale by the Treasury of the United States out of a certain money payment due to the Indians and that the said award or judgment should be distributed by Butler & Vale among the several claimants on the basis of an agreement among them. A true copy of said special jurisdictional act is attached hereto marked "Butler & Vale Exhibit A."

9. That your cross complainants and intervenors Butler & Vale prosecuted in the Court of Claims the claim of the attorneys for the fee due them by the Court of Claims in the firm name of Butler & Vale and at their own firm expenses for costs of suit, which said costs were heavy and burdensome and were solely borne by said Butler & Vale with the knowledge of the several other attorneys claiming interests in the fee to be awarded. That Hugh H. Gordon, Benjamin Miller, Administrator of the estate of Levi Maish, deceased, and Heber J. May, repudiated their agreements with reference to the fees and intervened at the hearing by the Court of Claims of the question referred to said Court of Claims of the fee that it should find due and payable by the Colville Indians. That the Court of Claims found the total fee due by the Colville Indians to their attorneys on account of prosecution of the aforesaid claim of \$1,500,-000 against the United States to be \$60,000. That so much of said decree as fixed and adjudicated the total fee due by the Indians is valid and binding. That in excess of its jurisdiction and without authority of and contrary to law, equity and right the Court of Claims thereupon undertook to and did violate the terms of the jurisdictional act referring the matter of fee due by the Indians to it, and over the protest of your cross complainants and intervenors

47. Butler & Vale, and attempted to pass a judgment or decree finding the several sums to which various attorneys were entitled out of the total fee award of \$60,000 and directed that judgments should be entered up in the several names of each of these attorneys. That the division of the fee as made by the Court of Claims was as follows:

To Benjamin Miller, Administrator of the Estate of Levi

Maish, deceased .....	\$6,000.00
To Hugh H. Gordon .....	14,000.00
To Marion Butler.....	20,000.00

To Josiah Vale.....	10,000.00
To Daniel B. Henderson.....	5,000.00
To Heber J. May.....	3,000.00
To Frederick C. Robertson.....	2,000.00

That the foregoing separate findings, awards or judgments were not and are not in accordance with the agreements between the parties referred to in the jurisdictional Act of Congress. That the amounts awarded Benjamin Miller, Administrator, Hugh H. Gordon and Heber J. May are far in excess of the amounts to which they are entitled under the agreements referred to in the Act of Congress, while the amounts awarded to Marion Butler and Josiah Vale are far less individually or collectively than the firm of Butler & Vale was and is entitled under the terms of the agreements referred to in the Act of Congress or than either of the members of said firm of Butler & Vale was and is entitled to under the agreement between them, said Marion Butler and said Josiah Vale, with reference to said firm fee. That your cross complainants and intervenors were put to heavy expense in prosecuting before the Court of Claims the claim to the fee to be paid by the Indians, none of which expense was borne or offered to be borne by the other parties to the consolidated suits, and the Court of Claims in its alleged judgment or decree awarded Butler & Vale no reimbursement of the costs to which they necessarily had been subject, including attorneys' fees.

10. That the Court of Claims was absolutely without jurisdiction to render judgment or decree save in the name of Butler & Vale for the total fee awarded to be paid out of the funds of the Indians and its judgment or decree so far as it attempted to adjudicate the several sums due each attorney is null and void. That the Treasurer of the United States is without authority of law to pay the moneys or any part thereof found to be due by the Indians except to Butler & Vale, and so likewise are the receivers succeeding him. That your cross complainants and intervenors by reason of the fact that the sums adjudged and decreed in their names was far less than the amount of which the firm of Butler & Vale were entitled and inasmuch as acceptance of the same could injure no one received and accepted from the Treasurer of the United States the sums adjudged and awarded them individually by the Court of Claims. That your cross complainants and intervenors Butler & Vale are by law entitled to

48 have the entire balance of the fee found due by the Colville Indians on account of prosecution of their afore-mentioned claim paid over to them Butler & Vale, to have the several purported findings or awards adjudged by the Court of Claims as due to each person named in said award, judgment or decree declared null and void, to have a decree passed by this Honorable Court directing that the balance remaining after payment of costs of suit shall be disbursed by Butler & Vale in accordance with the terms of the agreements referred to in the Act of Congress.

Wherefore, the premises considered your cross complainants and intervenors Butler & Vale pray as follows:

First. That process may issue out of this Honorable Court directed

against the said Hugh H. Gordon, Benjamin Miller, Administrator of the Estate of Levi Maish, deceased, the Indian Protective Association, Heber J. May, Frederick C. Robertson, Richard D. Gwydir, J. W. Edwards, Wendell Hall and James B. Archer, Charles Poe and Nathan S. Fawcett, the receivers appointed by this Court, commanding them and each of them to appear in this Honorable Court to answer the premises and to abide by and perform such orders or decrees as may be passed herein.

Second. That a final judgment or decree be passed by this Honorable Court declaring your intervenors and cross complainants, the firm of Butler & Vale, entitled to the entire balance remaining under control of this Court of the fee found by the Court of Claims to be due by the Colville Indians to attorneys for the successful prosecution of the claim of the Colville Indians against the United States for the \$1,500,000 herein referred to and directing that the same be turned over to the firm of Butler & Vale.

Third. That the purported findings, awards, judgments, or decree of the Court of Claims declaring or undertaking to declare the distributive share of each attorney in the fee of \$30,000 herein referred to as due by the Colville Indians to the attorneys for successful prosecution of their claim for \$1,500,000 be declared null and void and of no effect and that the same be decreed set aside and for naught held.

Fourth. For such other and further relief as to the Court may seem meet and proper and the nature of the cause may demand.

The defendants to this cross bill are Hugh H. Gordon and Frederick C. Robertson personally and Charles Poe, James B. Archer and Nathan S. Fawcett, as Receivers, and the parties to the intervening petitions are Richard D. Gwydir, J. W. Edwards, Wendell Hall, the Indian Protective Association, Hugh H. Gordon, Benjamin Miller, Administrator of the Estate of Levi Maish, deceased, and Heber J. May and Charles Poe, James B. Archer and Nathan S. Fawcett, Receivers.

BUTLER & VALE.  
By J. M. VALE.

KAPPLER & MERILLAT,

*Solicitors for Intervenors and Cross Complainants.*

DISTRICT OF COLUMBIA, 88:

Josiah M. Vale, being first duly sworn, upon oath deposes and says: That he is a member of the law co-partnership or firm of Butler & Vale; that he has read the foregoing bill of complaint by him subscribed and knows the contents thereof; that the matters and things therein stated upon his own knowledge are true, and those things stated upon information and belief he believes to be true.

J. M. VALE.

Subscribed and sworn to before me this 22nd day of December, A. D. 1908.

[SEAL.]

MARTHA M. BECK,  
*Notary Public, D. C.*

My commission will expire October 23, 1912.

(Endorsed:) Let this paper be filed. Job Barnard, Justice.

50 *Order Sustaining Exceptions.*

Filed Feb. 10, 1909.

In the Supreme Court of the District of Columbia, Holding an  
Equity Court.

Consolidated No. 28005. Original No. 28006.

FREDERICK C. ROBERTSON and Others, Plaintiffs,  
vs.  
HUGH H. GORDON and Others, Defendants.

This cause came on to be heard upon exceptions filed by Plaintiff Robertson, November 13, 1908, to the answer of defendant Gordon filed November 2, 1908, which were fully argued by counsel for the respective parties.

Now, the same being understood, it is considered by the Court that the said exceptions numbered one, two, five and six be and hereby are sustained; and that the said exceptions numbered three, four and seven be and hereby are over-ruled.

It is ordered that the said defendant Gordon file his full and sufficient answer to the said bill of complaint on or before the next succeeding rule-day of this court.

JOB BARNARD, *Justice.*

In open Court, February 10, 1909.

51 *Amended Answer of Hugh H. Gordon.*

Filed Feb. 23, 1909.

In the Supreme Court of the District of Columbia.

In Equity. No. 28006.

F. C. ROBERTSON, Complainant,  
vs.  
HUGH H. GORDON et al., Defendants.

The defendant, reserving the benefit of all exceptions to the errors and insufficiencies of the bill of complaint herein in the same manner as if he had demurred thereto, makes answer to so much thereof as he is advised it is material for him to answer, and answering says:

One, two and three: He admits the allegations of paragraphs 1, 2, and 3, so far as they are material, to be substantially true as alleged.

Four. Answering the fourth paragraph of the bill of complaint, this defendant says it is true that by the sixth paragraph thereof the contract referred to was to continue in force until July 26, 1904.

as alleged, but whether said contract was impliedly continued in force and is yet in full force and effect by virtue of continued service thereunder, recognized, acquiesced in and confirmed by the United States, by Congress and the Colville Indians, or whether the services rendered by this defendant were so acquiesced in and so confirmed as alleged and thereby the same was impliedly con-

tinued in force and is yet in force, this defendant is unable  
52 to admit or deny, inasmuch as this is matter of legal opinion or construction: that this defendant, after the said 26th day of July, 1904, continued to render service under the said contract in pursuance of the subject matter thereof, intending to claim and subsequently claiming compensation thereunder for his said services, but he denies that the complainant rendered any services whatever under said contract, or had any interest in the same. Answering further, this defendant says that he has no knowledge of any adjudication wherein the said contract was "Held and considered as an element in determining the amount of compensation for services rendered the Colville Indians," except in the Court of Claims, to whom the determination of the amount of compensation for services rendered by attorneys to said Indians was referred, and the finding of the said last named Court constitutes the only source of information this defendant possesses in reference to any holding or consideration thereon, and he refers to the decision of the said court filed in this cause, marked "Exhibit A" to his original answer, for the information of the court and complainant upon the subject, if by the complainant's bill he intends that it was therein so held and considered.

Five. The defendant denies that Maish and Gordon entered into any agreement with the complainant at any time, as alleged in the 5th paragraph of the bill, but says on the contrary Maish died in February, 1899; he further denies that he individually entered into arrangements and agreements with the complainant "to assist in prosecuting and securing the collection and payment" of the

claims of the Colville Indians or the prosecution thereof, as  
53 alleged: he further denies that in consideration of assistance

agreed to be furnished or furnished by the complainant this defendant agreed to or did admit the complainant to an equal or other partnership interest or share with this defendant in the claim of attorneyship of and for the Colville Indians, as alleged. The defendant admits, however, that there was an arrangement and agreement between himself and the complainant in respect of the claim of the Colville Indians, but says the complainant wholly fails to correctly set forth the same, as will hereinafter more particularly appear. He further admits the execution of the paper writing, dated the 28th day of March, 1903, set out in the said paragraph of the bill, but he denies that the said writing "settled and reduced to writing" the arrangements and agreements between the complainant and defendant, as will also more particularly appear herein-after.

Further answering the defendant says the arrangement and agreement hereinbefore mentioned was as follows, namely: That

on the 9th day of May, 1904, the complainant in writing agreed with the defendant that he, the said complainant, would obtain from the said Colville Indians a new contract, to be approved by the proper government officials, said agreement and writing not stipulating the compensation of the said complainant for so obtaining the same, and thereafter, on the 28th day of March, 1906, by the mutual contract set out in the complainant's bill, the compensation of the complainant, in case he should so obtain the said new contract, was fixed by the said writing; and the agreement of the said complainant aforesaid to obtain the said new contract, was the sole consideration for the said writing dated March 28,

54 1903, and the said writing was merely a supplemental agreement, made solely to fix the compensation of the complainant for the service to be performed by him under the said prior agreement and arrangement. The defendant further avers that the subject matter of the said agreement of March 28, 1906, as to the complainant's compensation was the obtaining of said new contract under said prior arrangement, and the provision of the said writing that the parties thereto were to share equally in all moneys appropriated or allowed as alleged "whether allowed under the Maish and Gordon contract \* \* \* or on any other theory whatsoever" was inserted, and so understood to be, for the protection of the complainant, in case he should so obtain said new contract, in the contingency that compensation should be allowed upon some other theory than under the contract so to be obtained as aforesaid, and so it was the agreement and understanding that the said Robertson, under the said paper writing, was to be entitled to share with the defendant any compensation received in case the said new contract should be obtained and not otherwise, and in such case the contingency of the allowance of compensation to attorneys under the Maish and Gordon contract was provided for, by the last clause of the agreement of March 28, 1903, limiting the said Robertson to a share of the net sum accruing to said Gordon, after "settling with other attorneys under contracts" theretofore made by said Gordon.

Further answering, the defendant admits the advancement of the \$150.00 mentioned in the receipt set out by the complainant, but he says the object of the said advancement was to prevent the approval of a contract obtained by other parties, which if 55 approved would have prevented the said Robertson from obtaining said new contract, the procurement of which was the consideration for the said agreement of March 28, 1906 which consideration wholly failed by the failure of the said complainant to obtain said new contract, the said Robertson not being required to, and never having performed any service in the prosecution of the claim of the said Indians.

Six. The defendant admits that the claim of the Colville Indians aforesaid was duly prosecuted in despite of the complainant's failure to obtain said new contract, and that appropriation was made as in and by the Acts set out in the 6th paragraph provided, but he denies that any portion of the funds, so appropriated, that are or were in

the Treasury to the credit of this defendant is subject to any lien of the complainant or of Butler and Vail, and he denies that the same is liable to be drawn or subject to be paid to said Butler and Vail or said Colville Indians, or that the withdrawal by this defendant of the \$14000.00 awarded to him would in anywise injure complainant, or that complainant has any claim against this defendant in respect to same.

Seven. Defendant admits the allegations of paragraph 7 of the bill as to the prosecution in the Court of Claims, and as to the citations of the decree of said Court, but denies the allegations of the concluding portion of said paragraph (Erroneously marked "9") that the total sum of \$60000 awarded is liable to be drawn from the Treasury by Butler and Vail, and also denies that the withdrawal by defendant of \$14000.00 awarded to him would in anywise injure the complainant, or that the complainant has any claim against the defendant.

Eight. Defendant denies that the complainant rendered

56 "extensive, laborious or important" service as alleged in paragraph 8 of the bill, or that any allowance to defendant was the result of any service of the complainant jointly with defendant or otherwise, but says in fact that the claims of the complainant, if any, were fully presented to the Court of Claims and fully and finally adjudicated and he denies all allegations relative to any division or right of division between himself or said Robertson; and he here suggests and urges that this court has no jurisdiction to consider or allow any claim of the complainant in the premises, for the reasons appearing in this paragraph. And in response to the plaintiff's allegations that the "Court of Claims made no judgment, decree or division between the parties in respect of any agreements or contracts among themselves" this defendant avers that the complainant, in the said Court of Claims, appeared and submitted his claim to one-half of the compensation to be awarded to this defendant, and the defendant is advised and believes and upon such information and belief avers that the complainant was in all legal respects a party to the said cause in the said Court of Claims; that he submitted to, and the said Court had, jurisdiction to hear and determine his rights, and as the defendant expects to prove at the trial of this cause, the complainant elected to stand, as against this defendant, as well as the Colville Indians and the United States, upon the reasonable value of the services he claimed and claims to have rendered in the premises, and this defendant claims the benefit of said election and the estoppel resulting therefrom and therefore avers the title and claim of the said complainant here presented is a

57 thing adjudicated by the Court of Claims against the said

complainant and is not a subject for inquiry by this Court.

Nine. The defendant has no knowledge as to the notices referred to in paragraph 9 of the bill, but he denies every allegation which in any way asserts or sets up any claim to the \$14000.00 awarded this defendant.

Ten. Defendant avers it to be likely that if his award of \$14000.00 be paid to him he will return to his home in Florida, taking his

belongings with him. He also admits that he has no valuable property in the District of Columbia, but he denies the allegation made on "information and belief" that the defendant has no property "elsewhere" sufficient to meet the claim of the complainant, if the said claim has any foundation, which the defendant denies. He also denies that the complainant has any ownership, lien or claim whatever upon the award of \$14000.00 to defendant.

And having answered fully, the defendant prays to be hence dismissed, with his reasonable costs.

HUGH H. GORDON.

ANDREW LIPSCOMB,  
JAMES B. ARCHER, JR.  
*Solicitors for Defendant.*

DISTRICT OF COLUMBIA, *To wit:*

I, Hugh H. Gordon, do solemnly swear that the facts above stated as of my personal knowledge are true, and those stated upon information and belief I believe to be true.

HUGH H. GORDON.

Subscribed and sworn to before me this 23 day of February, 1909.

J. R. YOUNG, *Clk.*  
By F. E. CUNNINGHAM,  
*Asst. Clk.*

58      *Amendment to Intervening Petition and Cross-Bill.*

Filed Mar. 3, 1909.

In the Supreme Court of the District of Columbia.

Eq. No. 28005. Consolidated.

RICHARD D. GWYDIR et al., Complainants,  
vs.

HUGH H. GORDON et al., Defendants.

Come now the intervenor and cross complainant Butler & Vale and amend their intervening petition and cross bill by inserting in paragraph 8 of said intervening petition and cross bill after the words "this fact was well known to Congress and the Committees thereof." the following:

"that at and long before the Act of Congress herein referred to was passed providing for the payment of the Colville Claim and of attorneys fees, as provided for therein all contracts of attorneys with the Colville Indians for the prosecution of the claim aforesaid, had expired, ceased and determined, and none of the parties to this bill or any other parties whatsoever had any contracts or claims against said Indians for services as attorneys or otherwise in the

matter of the prosecution of said claim that was or were valid and lawful, or that was or were enforceable at law or in equity and all parties to the pending litigation were aware thereof and so understood and knew at, before and after the time of the passage of the Act of Congress providing for the payment of said claim."

BUTLER & VALE.

KAPPLER & MERRILLAT,  
*Attorneys.*

59                   *Replication of Frederick C. Robertson.*

Filed Mar. 5, 1909.

In the Supreme Court of the District of Columbia, Holding an Equity Court.

No. 28005 Consolidated. Nos. 28000, 28005, 28006, Original.

THE INDIAN PROTECTIVE ASSOCIATION, RICHARD D. GWYDIR, J. W. EDWARDS, WENDELL HALL, FREDERICK C. ROBERTSON, Plaintiffs,  
vs.

HUGH H. GORDON, BENJAMIN MILLER, Administrator of Levi Maish, Deceased; Marion Butler and Josiah M. Vale (Butler and Vale), Defendants.

This repliant, saving and reserving to himself all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto saith, that he will aver and prove his said bill to be true, certain, and sufficient in the law to be answered unto; and that the said answer of the said defendant is uncertain, untrue and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is, and will be, ready to aver and prove, as this honorable Court shall direct; and humbly prays, as in and by his said bill he hath already prayed.

FREDERICK C. ROBERTSON, Plaintiff.

By GEORGE H. PATRICK,  
*His Solicitor.*

March 3, 1909.

Leave to file granted.  
WRIGHT, Justice.

*Demurrer to Petition and Cross Bill of Butler and Vail.*

Filed Mar. 6, 1909.

In the Supreme Court of the District of Columbia.

In Equity. No. 28005 Consolidated.

RICHARD D. GWYDIR et al., Complainants,  
vs.  
HUGH H. GORDON et al., Defendants.

This complainant, Indian Protective Association, a corporation, by protestation, not confessing or admitting any of the matters and things alleged in the Petition and Cross Bill of Butler and Vail herein, to be true in manner and form as the same are alleged, demur to the said petition and the Cross Bill and the relief prayed therein and say there is no equity in the same and that the said Petition and cross Bill present no matter for the cognizance of this Court or any cause of action whereon the Court can ground the relief prayed in and by the same or any other equitable relief whatsoever.

CHARLES POE,  
BERRY & MINOR,

*Solicitors for Complainant, Indian Protective Association.*

61 We hereby certify that in our opinion the foregoing demurrer is well founded in law.

CHARLES POE & BERRY & MINOR,  
*Solicitors for Complainant,*  
*Indian Protective Association.*

DISTRICT OF COLUMBIA, ss:

I, Daniel B. Henderson, being first duly sworn according to law, upon oath depose and say that I am the Secretary of the complainant, Indian Protective Association, and that the foregoing demurrer is not interposed for any purpose of delay.

DANIEL B. HENDERSON.

Subscribed and sworn to before me this 25th day of February,  
A. D., 1909.

[SEAL.]

NEENAH LAMB.

*Notary Public, D. C.*

*Opinion.*

Filed April 2, 1909.

In the Supreme Court of the District of Columbia.

No. 28005. Equity.

RICHARD D. GWYDIR et al., Complainants,

v.

CHARLES H. TREAT, Treasurer, etc., et al., Defendants.

Marion Butler and Josiah M. Vale, partners, doing business in the firm name of Butler & Vale, on Dec. 22, 1908, filed in this cause, (alleged to be consolidated with Equity causes No. 28,000, 28,001, and 28,006), their intervening petition, answer, and cross-bill, in which they state that The Indian Protective Association, a corporation, filed its bill in said Equity cause No. 28,000, praying for an injunction to restrain the defendant, Charles H. Treat, as Treasurer of the United States, from paying to the defendants, Hugh H. Gordon and Benjamin Miller, administrator, and to enjoin said Gordon and Miller from receiving, the sums of \$14,000 and \$6,000 re-

63 spectively, which were awarded them for services to the Colville Indians, by a judgment of the Court of Claims, the said Indian Protective Association claiming an equitable lien on the said sums of money by virtue of certain contracts with said Gordon.

They also aver that said corporation filed its bill in said Equity cause No. 28,001, seeking the same character of relief against the said Treasurer, and Heber J. May, to whom was awarded \$3,000 for like services, by said Court of Claims, and claiming a lien thereon, or an equitable interest therein, for the amount of the entire award.

That the complainants in this cause, (No. 28,005,) Richard D. Gwydir, et al., filed their bill against said Treasurer, and said Gordon and Miller, seeking the same relief, and claiming an equitable interest in the said sums awarded to said Gordon and Miller, for alleged services rendered to Maish & Gordon under a contract; and that Frederick C. Robertson filed his bill in Equity cause No. 28,006, against these petitioners, and said Gordon, said bill averring that these petitioners, Butler & Vale, had no interest, except for the benefit and use of said complainant Robertson, and said Gordon; and that said Robertson was entitled to a one-half interest, plus \$150 out of the total sum awarded to both said Gordon and Robertson by the said Court of Claims, Gordon being awarded \$14,000 and Robertson \$2,000.

That the said several causes were consolidated, and receivers were appointed for the several funds, and leave granted for the petitioners to intervene, answer, or file a cross-bill, in each of said causes. That the said bill herein as to said defendant Treat, Treasurer, etc., was dismissed, and the funds were turned over to the receivers.

The petitioners then deny that either or any of the said parties,

except themselves, are entitled to have paid to them any of the sums of money claimed or alleged to be due them, whether by virtue of the award of the said Court of Claims, or by assignments, transfers, or conveyances, of any part of said award: and they deny that any of the several other parties aforesaid have any interest in the award or awards, save subject to the rights of these cross-complainants, and save as these cross-complainants may justly find to be due them, or either of them.

That the cross-complainants and interveners, Butler & Vale, are entitled to have the whole of the said several sums mentioned in the said several bills, paid over to them, the same to be by them disbursed in accordance with the act of Congress, after first deducting the cost of prosecution in the Court of Claims, including reasonable attorneys' fees; and to have the award, judgment, or decree, of the Court of Claims, purporting to find the several shares of the several claimants to the attorneys' fund or fee, set aside as null and void, and in excess of the jurisdiction of said Court of Claims; and to have a decree directing the payment to them of the entire sum of the total award made by the Court of Claims to attorneys for said services to said Colville Indians.

The petitioners then state that the Colville Indians for many years past had a claim against the United States for \$1,500,000, for land ceded to the United States. That they had attorneys to prosecute said claim, among whom were Maish & Gordon, Butler & Vale, Heber J. May, Frederick C. Robertson, Daniel B. Henderson, and others. That Butler & Vale took the most active part in the prosecution of the said claim of said Indians before the committees of Congress. That the final provision by Congress, for payment of said claim, was due almost entirely to the efforts of Butler & Vale, after Maish & Gordon, and most of their associates, had failed; and this fact was well known to Congress.

By leave of Court, the petitioners filed, on Mar. 3, 1909, an amendment to their said petition and cross-bill, averring therein that at and long before the act of Congress herein referred to was passed, all contracts of attorneys with the Indians for the prosecution of said claim had expired, and none of the parties to this bill, or any other parties whatsoever, had any contracts or claims against said Indians for services as attorneys, or otherwise, in the matter of the prosecution of said claim, that were valid or enforceable at law or in equity; and all parties to the pending litigation were aware thereof before the passage of the said act of Congress.

By the original petition they then aver, that Congress, as the special guardian of the Indians, passed said jurisdictional act for the payment of the attorneys' fees after said attorneys, each and all of them, had agreed among themselves on the basis of division of the total fees to be awarded; and said act conferred jurisdiction on the Court of Claims to ascertain the total fees due by the Indians for the services of all attorneys, and directed that the proceedings should be in the name of Butler & Vale, and judgment rendered in their name, and the amount paid to them; and that they should distribute the said award among the several claimants on the basis of an agreement

among them; and they annex a copy of said act, marked "Butler & Vale, Exhibit A."

They then aver that they prosecuted the claim for attorneys' fees in the Court of Claims in their name, and at their expense, with the knowledge of the several other attorneys claiming interest therein.

That the said Gordon, Miller, and May, repudiated their agreements with reference to the fees, and intervened at the hearing in the Court of Claims, which court found the total fee due by said Indians to be \$60,000. That so much of said decree as fixed the total fee is valid and binding. That in excess of its jurisdiction, and contrary to law, said court undertook to and did violate the terms of the said jurisdictional act, over the protest of the cross-complainants, Butler & Vale, and attempted to pass judgment, finding the several sums to which the various attorneys were entitled, and directing judgment to be entered in the several names, as follows:

Benjamin Miller, administrator.....	\$6,000
Hugh H. Gordon.....	14,000
Mariou Butler .....	20,000
Josiah Vale .....	10,000
Daniel B. Henderson.....	5,000
Heber J. May.....	3,000
Frederick C. Robertson.....	2,000

65 That said separate findings were not in accordance with the agreements between the parties referred to in the said act of Congress. That the amounts awarded said Miller, Gordon, and May are far in excess of the amounts to which they are entitled under said agreements, while the amounts awarded to Butler & Vale are far less individually or collectively, than the firm of Butler & Vale are entitled to under the terms of said agreements, or than either of the members of said firm was so entitled.

That they were put to heavy expense in prosecuting the suit in the Court of Claims, none of which was borne by the other parties, and none of which was reimbursed to them by the decree therein.

They then aver that the said Court of Claims was absolutely without jurisdiction to render any judgment or decree, except in the name of Butler & Vale, for the total amount to be paid out of the funds of said Indians; and that the decree, so far as it attempted to adjudicate the several sums due each attorney, is null and void; and that the said Treasurer is without authority to pay the moneys to any one except to Butler & Vale, and so likewise are the receivers succeeding them.

That the petitioners, by reason of the fact that the sums adjudged in their names are far less than they were entitled to, and in as much as acceptance of the same could injure no one, they aver that they received and accepted from the Treasurer of the United States, the sums so awarded them individually. That they are entitled to have the entire balance of the fees so found to be due paid over to them, and to have the several findings or awards by the Court of Claims, as due to each person named therein, declared null and void; and to have a decree passed by this court, directing that the

balance remaining after payment of costs of suit shall be disbursed by them in accordance with the terms of the agreements referred to in said suit.

They pray for process, and for a final judgment or decree, declaring them entitled to the entire balance of said fee remaining under the control of this court; and that the same be turned over to them; and that the purported findings, awards, judgments, or decree, of the Court of Claims, declaring the distributive share of each attorney in the said fee of \$60,000, be declared null and void, and of no effect, and that the same be decreed set aside, and for naught held; and for such other and further relief as to the court may seem meet and proper and the nature of the cause may demand.

To this intervening petition and cross-bill, the Indian Protective Association, Hugh H. Gordon, and other defendants, have filed a general demurrer, alleging that there is no equity in the said petition and cross-bill, and no foundation therein for any equitable relief whatsoever; and the cause has been argued and submitted on that demurrer.

The special act of Congress, made an exhibit to said bill, may be found in 34 Statutes-at-Large, page 378, the same being a provision in the act making appropriations for the current and contingent expenses of the Indian Department, for fulfilling the treaty stipulations with various Indian tribes, and for other purposes, for 66 the fiscal year ending June 30th, 1907, said act being approved June 21, 1903.

The act provides \$1,500,000 for said Colville Indians, in payment for the cession of lands from them, being for 1,500,000 acres of land opened to settlement under act of July 1, 1892.

Jurisdiction is conferred upon the Court of Claims to *hear, determine and render final judgment*, in the name of Butler & Vale, (Marion Butler and Josiah M. Vale), attorneys and counselors at law of the City of Washington, District of Columbia, *for the amount of compensation which shall be paid to the attorneys who have performed services as counsel on behalf of said Indians*, in the prosecution of the claim of said Indians for payment for said land.

It then provides that said court, in determining the amount of compensation for such services, may consider all contracts or agreements heretofore entered into by said Indians with attorneys who have represented them in the prosecution of said claim, and also all services rendered by said attorneys for said Indians in the matter of said claim.

It then directs the manner of procedure in said court, requiring the petition to be filed by said Butler & Vale within thirty days, the appearance of the Attorney General on behalf of the United States and the Indians, and that preference shall be given by the court for immediate hearing; and then providing that the Secretary of the Treasury is authorized and directed to pay the sum so awarded by said court to the said attorneys, (Butler & Vale), *upon the rendition of final judgment*, out of the said \$1,500,000 set apart for said Indians, which payment shall be in full compensation to all attorneys who have rendered services to said Indians in said matter, the same to be

apportioned among said attorneys by said Butler & Vale, *as agreed among themselves*, "Provided, that before any money is paid to any attorney having an agreement with Butler & Vale as to the distribution of said fees, each of the same shall execute and deliver to the Secretary of the Interior, a satisfaction and discharge of all claims and demands for services rendered said Indians in the matter of their said claim."

The position taken by the complainants in this cross-bill is, that the proceeding in the Court of Claims, so far as the award is made to the individuals named therein, (excepting as to Marion Butler and Josiah Vale), is a nullity. If that award is void as to *one* individual, it must be void as to all, without exception, and if so, then there would seem to be no title to the moneys awarded, in any of the individuals named, including the complainants in the cross-bill.

That court had jurisdiction, or it had not. If it had no jurisdiction to make award to individuals, which was the only thing done by its decree, then the title to the \$60,000 awarded to said individuals, still remains in the said Indians, and the firm of Butler & Vale have no more right in this court to ask for relief in regard to the same, than they would have had before the said act of Congress was passed, giving, or purporting to give, jurisdiction to the Court of Claims.

No award was made to the firm of Butler & Vale, notwithstanding they had filed the petition as a firm, and insisted that a gross sum should be awarded to them, sufficient to pay all the attorneys who had rendered services to said Indians in the matter of their said claim. The act, however, giving jurisdiction to the Court of Claims, required that court to hear, determine, and render final judgment, for the amount of compensation *to be paid to the attorneys performing services* for said Indians, the said compensation to be ascertained from a consideration of all contracts, and of the character and value of all services rendered.

On that theory the Court of Claims took jurisdiction; and if its construction of the law is correct, it became the duty of that court to hear testimony, and to ascertain the value of the services of each attorney engaged in the prosecution of the said claim for said Indians, regardless of any agreement with Butler & Vale, fixing the value of such services.

The averment of the petition of the complainants herein is that the findings of the Court of Claims do not agree with the rights of the parties as established by the agreements said to be referred to in said act; that they have been awarded less than is their due, and the others awarded more. I take it for granted that the Court of Claims had no jurisdiction to find in favor of any attorney, that he was entitled to anything more or less than his services were worth under all the circumstances; and if the court had that power, and the agreement made with Butler & Vale fixed a different amount that any such attorney should have, that the judgment of the Court of Claims must prevail over that agreement. If there is any contradiction in the terms of the law, that contradiction must be reconciled, and the statute construed, by the Court of Claims in the exer-

cise of the jurisdiction conferred. That court construed the law to mean for it to deal justly by all parties, and to award nothing to any one unless he had justly earned it.

This court cannot affect in any way the judgment of the Court of Claims by correcting any alleged errors that that court may make, in any case of which it has jurisdiction. If its decision is wrong, the error must be corrected by appeal or motion for a new trial.

There can be no question but that the court had jurisdiction; and if they have acted contrary to the statute with reference to the method of its exercise, that would be only an error in the proceeding, and must be corrected, if at all, in that court, or by an appeal to the Supreme Court.

The court was to determine the amount of the compensation to be paid to *all* of the attorneys in the class named, after considering *all* the services rendered by them. This amount would be the sum of the several amounts found to have been earned by each individual or firm. It could not be properly ascertained except by first finding the several sums as on a *quantum meruit*, and adding them together.

The petitioners claim that the court had no power to so find, but must find a gross sum only, to be awarded to and divided by them among unknown or unnamed attorneys under the provisions of an unknown or undisclosed agreement, which may not be such an agreement as a court of equity could under any circumstances specifically enforce.

To illustrate the fallacy of this claim, let us suppose that the defendant Gordon is only entitled to \$7,000 under the agreement which is said to have been referred to in the said act. The court has, nevertheless, found him entitled to \$14,000. If he should receive only the \$7,000 under the said agreement, the other \$7,000 awarded to him would be received by some other attorney who was not entitled to it in the judgment of the Court of Claims. It was the judgment of that court that the law required in ascertaining the amounts to be properly paid, and in the case supposed that purpose of the law would be thwarted. If Gordon was only entitled to \$7,000, and no one else was entitled to any more than was awarded him, then the Indians would be unjustly deprived of \$7,000, if a gross sum of \$30,000 had been awarded to Butler & Vale.

The actual amounts earned by each attorney or firm having been ascertained, as we must assume, in a proper way, such fund ought in equity and law to be paid to such attorney, unless some other party has some equitable claim or lien upon it, by virtue of some valid contract based upon a good and sufficient consideration, and in that event a court of equity will undertake to make the distribution between the attorney to whom the fund was awarded and the other party who may have such equitable lien or claim thereon.

The petitioners, however, have not set up any such contract, and have not shown by their cross-bill any right to any portion of the money awarded to the other attorneys which a court of equity can enforce. They have taken the sums awarded to them individually, and thus recognized the legality of such awards, and it is claimed by counsel for the other parties, that they are thereby estopped from

questioning the legality of any of said awards. I am disposed to think such contention is well founded.

It is sufficient, however, for me to say, that I do not think there are any facts stated in said cross-bill, which if established by proof would entitle the complainants therein to any relief in this court and I will therefore sustain the demurrers.

JOB BARNARD, *Justice.*

*Decree.*

Filed April 13, 1909.

In the Supreme Court of the District of Columbia.

Nos. 28000, 28005, 28006, Equity Doe, 62.

RICHARD D. GWYDIR et al.

vs.

CHARLES H. TREAT et al.

These causes coming on to be heard upon the demurrer of the Indian Protective Association, the complainant in cause No. 28000, and Richard D. Gwydir, et al., the complainants in cause No. 28005

to the intervening petition of Marion Butler and Josiah M. Vale filed therein, also upon the demurrer of H. H. Gordon and Benjamin Miller, Admr', and also upon the demurrer of Frederick C. Robertson, complainant, in equity cause No. 28006 to the cross-bill of said Marion Butler and Josiah M. Vale, heretofore filed therein, were together considered by the court, having been submitted thereto, and it is thereupon, by the court, adjudged and ordered that the said demurrers be and the same hereby are sustained, and said intervening petition and said cross-bill are hereby dismissed with costs, this 13th day of April A. D. 1909.

JOB BARNARD, *Justice.*

70

*Order Sustaining Demurrers.*

Filed Apr. 13, 1909.

In the Supreme Court of the District of Columbia, Holding an Equity Court.

Equity. No. 28000.

Equity. No. 28005.

Equity. No. 28006.

RICHARD D. GWYDIR et al.

vs.

CHARLES H. TREAT et al.

These causes coming on to be heard upon the denurrer of the Indian Protective Association, the complainant in cause No. 28000, and Richard D. Gwydir, et al., the complainants in cause No. 28005 to the intervening petition of Marion Butler and Josiah M. Vale filed therein, also upon the demurrer of H. H. Gordon and Benjamin Miller, Admr', and also upon the demurrer of Frederick C.

Robertson, complainant in equity cause No. 28006 to the cross-bill of said Marion Butler and Josiah M. Vale, heretofore filed therein, were together considered by the Court, having been submitted thereto, and it is thereupon by the court, adjudged and ordered that the said demurrers be and the same hereby are sustained, and said intervening petition and said cross-bill are hereby dismissed with costs, this 13th day of April A. D. 1909.

JOB BARNARD,  
*Associate Justice.*

71

*Amendment to Decree Dismissing Bill.*

Filed Apr. 16, 1909.

In the Supreme Court of the District of Columbia.

Eq. No. 28005, Consolidated.

RICHARD D. GWYDIR et al., Complainants,  
vs.

HUGH H. GORDON et al., Defendants.

It is by the Court this 16th day of April, 1909, ordered that the decree heretofore entered in this cause on the 13th day of April, 1909, sustaining the demurrer to the Cross Bill and dismissing the Cross Bill of intervenors and cross complainants, Butler & Vale, be, and the same hereby is amended by adding thereto the following:

The cross complainants, Butler & Vale, appearing in open court noted an appeal from the above decree of the court to the Court of Appeals, and the same was by the Court allowed and bond for costs on appeal fixed in the sum of One hundred Dollars and to act as a supersedeas Fifteen thousand dollars.

By the Court.

JOB BARNARD, *Justice.**Memorandum.*

April 29, 1909.—\$100 deposited in lieu of appeal bond.

72

*Testimony on Behalf of Complainant.*

Filed May 6, 1909.

In the Supreme Court of the District of Columbia.

In Equity. Consolidated No. 28005. Original No. 28000, 28005, 28006.

FREDERICK C. ROBERTSON et al., Plaintiff,  
vs.

HUGH H. GORDON et al., Defendants.

*Deposition of Richard W. Nuzum.*

In pursuance of the notice hereto attached personally appeared before James W. Marshall, United States Commissioner, at Spokane,

Eastern District of Washington, at his office in said city, Richard W. Nuzum, a witness on behalf of the plaintiff, the plaintiff being present in person, and represented by his Attorney, Harry Rosenhaupt, and the defendant Hugh Gordon, being represented by Thomas A. Scott, the said hearing having been adjourned from the 12th day of April, 1909, to the 19th day of April, 1909, at the hour of 10:00 A. M. on said day and on said 19th day of April, 1909 at the hour of 10:00 A. M., personally appeared the said Richard W. Nuzum, a witness on behalf of the plaintiff the plaintiff being present in person and represented by his Attorney, Harry Rosenhaupt, and the defendant, Hugh H. Gordon being represented by Thomas A. Scott, whereupon the said RICHARD W. NUZUM  
73 being first duly sworn to tell the truth, the whole truth and nothing but the truth in the above entitled cause, testified as follows:

Direct examination.

By Mr. ROSENHAUPT:

Q. Please state your name? A. Richard W. Nuzum.

Q. Your residence, Mr. Nuzum? A. Spokane, Washington.

Q. Your business in life? A. Attorney-at-law.

Q. Are you acquainted with the plaintiff, F. C. Robertson? A. I am.

Q. How long have you known him? A. Known him since 1892 or 1893.

Q. Are you acquainted with the defendant Mr. Hugh Gordon? A. I am.

Q. When did you meet him? A. In Washington in 1903 in the spring.

Q. Please state, Mr. Nuzum, if you went to Washington in the spring of 1906 with Mr. F. C. Robertson? A. I did.

Q. For what purpose did you and he go there? A. To present the claim of the Colville Indians before the Committee in Congress that they might be allowed the million and a half dollars coming to them under the treaty with the government of the United States.

74 Q. What contract was Mr. F. C. Robertson claiming under? A. The contract known as the Maish-Gordon contract.

Q. What contract were you claiming under? A. The McDonald contract.

Q. State whether or not after you arrived in Washington you know of Mr. F. C. Robertson performing any service looking to the accomplishment of the object of securing the Colville Indians the sum of \$1,500,000.00 as claimed? A. I do.

Q. What service do you know of personally, Mr. Nuzum? A. Mr. Robertson worked in conjunction with myself, Butler & Vale and Hugh Gordon during three weeks which we were there, briefing and interviewing various members of the conference committee of Congress in relation to the hearing before the Senate Committee on Indian affairs, and doing all we could to insure the passage of

this bill, which would give the Indians their money, known as the Indian Appropriation Bill, that was our effort.

Q. Working all the time? A. That was our object.

Q. Do you know anything about any arrangements Mr. F. C. Robertson made with Mr. Hugh Gordon to share in the moneys that would inure to either the said F. C. Robertson or the said Hugh H. Gordon by reason of their services to the Colville Indians, whether allowed under the Maish-Gordon contract with the said tribes or any other theory whatsoever? A. Yes, I do.

Q. Just state what you know as to that contract as to  
75 the division? A. Then a contract was entered into between

Butler & Vale, Hugh H. Gordon and Mr. F. C. Robertson and myself. Gordon and Robertson were working together, both claiming to be equally interested in any fee allowed. I represented Mr. MacDonald and Judge M. J. Gordon, in which it was agreed that if one million five hundred thousand dollars was allowed them, this is my recollection of it that Mr. Robertson and Mr. Hugh Gordon were to get \$18,500.00. I believe that this \$18,500. was in the contract, set out how much each was to get and Judge M. J. Gordon, MacDonald and myself were to get \$18,500.00 and Butler and Vail were to get the rest.

Q. Do you recollect what the division was between Gordon and Mr. Robertson? A. Each were to get half, that is my recollection. After I arrived in Washington, in a conversation with Gordon just before that contract was signed—that is, Hugh Gordon, he told me that Robertson was to get half of what he got.

Q. State whether or not in discussion with the various Attorneys you know of Mr. Gordon attempting to increase the compensation to be allowed to F. C. Robertson and Hugh H. Gordon? A. Yes that was the principal bone of contention. I think he was claiming first a total \$60,000.00, out of the \$150,000.00.

Q. Please state whether or not Mr. Hugh Gordon, Mr. F. C. Robertson and Messrs. Butler & Vail were ready to go before the Conference Committee of the Senate and the House, and submit  
76 their respective claims as to the amount of money that they were entitled to? A. Yes sir.

Q. State if that was done? A. No sir, it was not.

Q. State why? A. The Conference Committee refused to hear any quarrel of the Attorneys. They said they wouldn't take up the time of the Committees attempting to adjust the claim of the various attorneys to compensation. Senator DuBois who was one of the Conference Committee told us that, and Senator Clapp also told us that, who was also one of the Conference Committee.

Q. Mr. Nuzum, state whether or not each of the respective parties mentioned were claiming for individual services by them rendered, so that there was no determination except by agreement between the Attorneys in any Department decision or in any Act of Congress as to the division of the Attorneys' fees? A. The only division of fees was to be as ascertained by the agreement of the Attorneys. The Department had nothing to do with that.

Q. State Mr. Nuzum, how long that trip took you and Mr. Robert-

son going and coming and while there in Washington? A. Going and coming,—we were in Washington three weeks and it took about a week to go and a week to come; that is it would take about four or five days, each way.

Q. I will ask you whether or not, if you know, Mr. Robertson intended to go to Washington from the first? A. No, he decided to go at the last minute, and left a case incompletely in the courts here. In fact I did not know he was going, with me, until I got on the train.

77 Q. I will ask you to state whether or not you were requested by *Mr. Gordon* in Washington to meet him there, and to discuss with him the best means of securing for the Colville Indians what they claimed to be due from the Government by reason of the taking of the north half of the Colville Indian Reservation? A. I was, and expected to do so.

Q. Mr. Nuzum, please state whether or not there were compromises, concessions and giving away here and there during the course of these negotiations by various Attorneys from what they claimed they were respectively entitled to? A. Yes sir, there was.

Q. I will ask you if Messrs. Butler and Vail's compensation when they were to receive the amount of money that you mentioned over the \$18,500.00 to Gordon and Robertson, and the \$18,500.00 to MacDonald and his associates was to be used by Butler & Vail to compensate other claims under the Maish-Gordon contract? A. Yes, they said they had made various contracts with other Attorneys and would have to pay them. One of them told me that their compensation would not amount to over \$20,000, or \$21,000, after paying other Attorneys.

Q. I will ask you to state whether or not in any conversation with Mr. F. C. Robertson you talked about whether you with your contract and he with his agreement with Mr. Hugh Gordon should appear in the action then pending in the Court of Claims to establish the amount of the respective rights of the Attorneys to the award before it was made? A. We talked it over, but my

78 idea of it was the contracts as already signed fixed the compensation of Mr. Robertson and Mr. Gordon, and MacDonald and his associates and we didn't make any appearance.

Q. Was it because of the wording of the Act that this compensation should be awarded in the name of Butler & Vale? A. Oh, yes, and then our contracts with them determined our rights.

Q. I will ask you if you discussed with Mr. F. C. Robertson whether or not an intervention ought to be filed on behalf of himself in the Court of Claims, and what your notion was in the premises? A. I had a conversation with Mr. Robertson and advised against it, because I didn't think it was necessary, I didn't have any doubt but what Butler & Vale would do just as they said they would do in their contract. We agreed to take so much on the basis of \$150,000 and it was to be reduced in proportion with any award that was made in the same percentage.

Q. Did you ever hear of any claim made by F. C. Robertson of any sum of money independent of the agreement made between him-

self and Mr. Hugh Gordon? A. No, I understood that that covered Mr. Robertson's rights.

Q. Now, the Butler & Vale contract, Mr. Nuzum, do you know whether that was fully executed when you left Washington or what was the condition of it? A. It was in Butler & Vale's hands, and I know that the parties all signed it, as far as Robertson and Gordon and Butler & Vale were concerned—I would not be absolutely positive.

79 Q. Mr. Nuzum, was that a trip of some expense? A. Yes, it was.

Q. About how much? A. It cost me about \$1,000, and cost Mr. Robertson about the same. We stayed in Washington three weeks—pretty expensive on that sort of business.

Q. In your opinion if the Attorneys had submitted that question to the Conference Committee of the Senate and of the House, do you believe that the amount of compensation due to each Attorney, even if agreed upon would have been inserted in the bill? A. No, it would not.

Q. How did you gain that information? A. In talking with members of the Conference Committee they said that the Indian department said that the Indians didn't need any Attorney, although they failed to get this appropriation in sixteen years' time and they were opposing the Attorneys always on the floor of the Senate.

Q. Is that because other Attorneys had made claims for services to the Indians and had them turned down in Washington? A. It is.

Q. With how many chiefs of the Indians did you consult? A. Two, Barnaby and Bernard.

Q. Did you have any agreement or contract between yourself and Mr. F. C. Robertson under the MacDonald contract, or did you claim under the Maish-Gordon contract? A. I claimed all the time under the MacDonald contract, and had no agreement with Mr. Robertson.

80 Q. Was that the procedure, that each was independent under your respective agreements? A. Independent.

Q. After you arrived in Washington City and took this matter up, was there any talk that you ever heard among any of the Attorneys, Messrs. Butler & Vale, Messrs. Hugh H. Gordon and Mr. F. C. Robertson, or yourself with regard to the procuring of any new contract with the Indians? A. Never was any such conversation—never heard of any such conversation.

Q. Would it have been possible to have obtained a new contract from the Indians in time to have rendered any service for the Indians under such new contract before the appropriation to the Indians would have been consummated by the final passage of the Act? A. No, I knew that the Act was on the Appropriation bill and was going to stay there. The House would adjourn the latter part of May or the 1st of June, and even if we could have got the permission of the Indian Department to go there and get a new contract, it would not have been approved. I recollect that this Colville Indian Amendment was offered in the Senate after it came from the House, and was adopted in Conference. But it was agreed when we left what

would be done. It had been agreed from the year before that the appropriation to the Colville Indians would be adopted in the year 1906.

81 Cross-examination.

By Mr. SCOTT:

Q. Mr. Nuzum, state how you became acquainted with the details of the contract said to have existed between Mr. Robertson and Hugh H. Gordon and the others? A. Well, I was there when the contract was dictated, I talked with Robertson and Gordon about it. I acted as intermediary between Robertson and Gordon who were claiming equally and Butler & Vail, who were denying their claims. I went out to Butler's house and finally agreed that when we settled the thing that our bunch of fellows claiming under the MacDonald contract were to receive \$18,500. Under the original contract with Butler & Vail the year before we were to receive \$22,500., but we threw off \$4,000., as I wanted to get the thing through and knew if we got to fighting among ourselves we wouldn't either of us get the amount of our claim.

Q. By whom was that contract signed? A. Butler & Vail, Robertson and Gordon, and myself on behalf of myself and my associates.

Q. That is the only contract concerning which you are testifying in this deposition? A. They asked me about the Maish-Gordon contract under which they were claiming. I had seen that contract.

Q. You don't mean to testify as to any contract that might be alleged to be in existence, between Hugh H. Gordon and F. C. Robertson? A. I testified that Gordon told me that he agreed to give Robertson half, but I have never seen any written contract, but Gordon told me of it in Washington.

82 Q. No details as to that contract? A. No, he didn't state—I didn't ask him; he told me that the agreement was to give half.

Redirect examination.

By Mr. ROSENHAUPT:

Q. During the time that you were in Washington, did you and Mr. Hugh Gordon become sufficiently well acquainted for him to present other matters to you? A. Yes, he wanted me to take an interest in some patents that he had there.

Q. What was the patent?

Mr. SCOTT: Object to that as incompetent.

A. Some fellow had a patent to gather the snow on the street and make brick-bricklets, he called it, of this snow and use them in the summer time for ice.

Q. Did you talk with him on various other matters? A. I became fairly well acquainted with him and discussed other matters with him.

RICHARD W. NUZUM

It was stipulated that this testimony should be transmitted by Judge Marshall as if the same had been taken down in longhand.

## 83 In the Supreme Court of the District of Columbia.

In Equity. Consolidated No. 28005. Original No. 28006.

FREDERICK C. ROBERTSON et al., Plaintiffs,  
vs.

HUGH H. GORDON et al., Defendants.

*Deposition of Rickard D. Gwydir.*

In pursuance of the notice hereto attached personally appeared before James W. Marshall, United States Commissioner, at Spokane, Eastern District of Washington, at his office in said City Rickard D. Gwydir, a witness on behalf of the plaintiff, the plaintiff being present in person, and represented by his Attorney, Harry Rosenhaupt, and the Defendant, Hugh Gordon, being represented by Thomas A. Scott, the said hearing having been adjourned from the 12th day of April, 1909, to the 19th day of April, 1909, at the hour of 10.00 A. M. on said day and on said 19th day of April 1909 at the hour of 10.00 A. M., personally appeared the said Rickard D. Gwydir, a witness on behalf of the plaintiff, the plaintiff being present in person and represented by his Attorney, Harry Rosenhaupt, and the defendant, Hugh H. Gordon, being represented by Thomas A. Scott, whereupon the said Rickard D. Gwydir being first duly sworn to tell the truth, the whole truth and nothing but the truth in the above-entitled cause, testified as follows:

## 84 Direct examination.

By HARRY ROSENHAUPT:

Q. What is your name? A. Rickard D. Gwydir.

Q. How old are you? A. Past sixty-two years.

Q. How long have you been a resident of the State of Washington?  
A. Since the Spring of 1887.

Q. Major, do you know Hugh Gordon, the defendant in this case? A. I do.

Q. Did you know him personally? A. I did.

Q. When did you first meet him? A. In Washington City, District of Columbia, 1893.

Q. Major, state whether or not you had anything to do with the negotiation of the original contract between Maish and Gordon and the Colville Indians? A. I did.

Q. Now, Major, (I now hand to the witness a paper entitled "contract between the several tribes of Indians resident upon the Colville Indian Reservation, and Levi Maish and Hugh H. Gordon" and ask him to look at the signatures and ask him if that is one of the copies as he recollects it)? A. That is one of the copies.

Mr. ROSENHAUPT: I now offer this copy in evidence, offering the said Contract, so identified, the same being now marked "Plt. Exhibit No. 7", and ask that the same be marked as "Plaintiff's Exhibit A" and that it now be admitted in evidence.

Q. What were you to be paid by Maish and Gordon for securing this contract originally? A. Ten Thousand Dollars.

Q. I will ask you Major, to state whether or not you are personally acquainted with the Indian signers of that original contract? A. I am acquainted with the entire tribe we got to sign it, personally.

Q. Now, Major, how did you get to know these Indians? A. I was Indian agent for those tribes for 1887 and 1888.

Q. During that time did you come in contact with the head men of these Indians? A. With all the head and principal men of all the tribes.

Q. After the execution of that contract what did you do with reference to keeping in touch with the Indians? A. Went around and visited them and seeing them and their principal men.

Q. I will ask you to state Major, whether or not you received any communications from Mr. Hugh Gordon in the year 1903 in relation to this contract? A. Yes, I have letters 1893, 1904 then on to 1908 from Hugh Gordon, all bearing on the same subject.

Q. I will ask you to state what is this letter I now hand you?

A. The letter is from Hugh Gordon.

86 Q. To whom? A. To me in answer to a letter of mine, which letter was in answer to a letter of his, requesting me to try and get an extension of the old contract.

Q. I will ask you Major, to state if it is in his handwriting, and was duly received by you? A. This is in his handwriting and was duly received by me.

Q. Mr. ROSENHAUPT: I now offer the letter dated Kirkwood, Georgia, Aug. 24, 1903, addressed to Major Gwydir, and ask that it be admitted in evidence and marked "Exhibit B."

(Letter is marked "Exhibit B.")

Q. I will now show you the letter dated Biscayne, Florida, dated Feb. 2, 1904, beginning "My dear Major", consisting of four pages and signed by Hugh H. Gordon, and ask if that is in Mr. Gordon's handwriting, and if you received it in due course of mail? A. It is in his handwriting, and received in due course of mail, and that is his signature.

Mr. ROSENHAUPT: I will now ask that this letter be introduced in evidence and marked "Plaintiff's Exhibit C."

Q. I will now show you a letter dated Biscayne, Florida, April 16th, 1904, beginning "My dear Major", consisting — six pages and signed Hugh H. Gordon, and ask you if you received that letter through the mail, and if it is in his handwriting? A. I received it through the mail, and the letter is in the handwriting of Hugh Gordon and is his signature.

87 Mr. ROSENHAUPT: I will now offer this letter in evidence and ask that it be admitted and marked: "Plaintiff's Exhibit D."

Q. I will now show you a telegram, addressed from Miami, Florida, addressed to R. D. Gwydir, signed and dated 27-28-1904

Hugh H. Gordon, state whether or not you received that telegram? A. I received that during 1906.

Mr. ROSENHAUPT: I will now offer this telegram in evidence and ask that it be admitted and marked "Plaintiff's Exhibit E." (The telegram is admitted, marked "Exhibit E.")

Q. I will now show you a telegram marked Miami, Florida, April 19, 1904, addressed to R. D. Gwydir, and ask you if you received that telegram from the Telegraph Office here? A. I have received it.

Mr. ROSENHAUPT: I will now offer this in evidence and ask that it be marked "Exhibit F." (The telegram is marked "Exhibit F.")

Q. I will show you a letter dated April 22nd, 1904, and ask you if that is in the handwriting of Hugh H. Gordon, and received by you in the ordinary course of mail. A. In the handwriting of Hugh H. Gordon, and that is his signature and I received it by mail.

Mr. ROSENHAUPT: I will now offer this in evidence and ask that it be admitted and marked "Exhibit G." (The letter is marked "Exhibit G.")

Q. I will next show you a letter, dated Biscayne, Florida, June 18th, 1905, and ask you if that letter is in the handwriting of Hugh H. Gordon and was received by you? A. That letter was received by me and is in the handwriting of Hugh H. Gordon, and that is Gordon's signature.

Mr. ROSENHAUPT: I will offer this in evidence and ask that it be admitted and marked "Exhibit H."

(The same is marked "Exhibit H.")

—. I will ask you, Major, if this letter postal headed Reynolds, Ga., July 9, 1904, addressed "My dear Major," signed Hugh H. Gordon, is Mr. Gordon's letter to you? A. Gordon's letter received by me through the mail. Gordon's signature.

Mr. ROSENHAUPT: I will offer this in evidence and ask that it be admitted and marked "Exhibit I."

Mr. SCOTT: No objection.

Q. I will now show you a telegram, dated Miami, Florida, March 17th, '04, signed Hugh H. Gordon, and ask you if that is Gordon's telegram to you and was received by you. A. It was received by me.

Mr. ROSENHAUPT: I will now offer this in evidence and ask that it be admitted and marked "Exhibit J."

(The same is marked "Exhibit J.")

Q. And also a telegram dated Miami, Florida, April 23, '04, from Hugh H. Gordon and ask if it was received by you from the telegram office here? A. Yes, same was received by me.

Mr. ROSENHAUPT: I will now offer this telegram in evidence and ask that it be marked "Exhibit K."

(Same is marked "Exhibit K.")

Q. Major, I will ask you to state whether or not you have any copies of the letters that you wrote to Mr. Gordon either proceeding or in reply to the various epistles of his to you that have been 89 by you identified? A. I have not.

Q. Major, please state whether or not in the several years following 1904, you consulted with Mr. Robertson concerning the claim of the Colville Indians. A. I did.

Q. State what was the nature of the consultation? A. I consulted with Mr. Robertson in connection with the Colville treaty with the Colville Indians and have him to take part in it with Gordon and myself.

Q. I will ask you, Major Gwydir, to state whether or not you knew of any services performed by Mr. Robertson in relation to the appropriation of Congress for the Colville Indians during the period prior to 1903 and after 1904 in the spring? A. I wrote to Mr. Hugh H. Gordon explaining to him the necessity of the case as it stood at the time, and told him that I thought that Mr. F. C. Robertson could be persuaded to take up the proposition, and work at this end of the line. Mr. Gordon wrote to Mr. Robertson on the matter, so he informed me, by letter, and afterwards told me to work with Mr. Robertson. After that Mr. Robertson sent me to Miles Post Office Fort Spokane, where there was a big pow-wow of all the tribes on the Colville Reservation, called there by the Indian agent, Captain Webster, and Major McLaughlin, Inspector of the Interior Department. I went there, started from here, went to Davenport by rail, and drove from there over to Fort Spokane in a heavy snow-storm, and called the next day on Captain —, and Major McLaughlin, and told them I would like to be allowed to address the Indians on the Colville treaty, also the

Gordon contract with the Indians which they had signed. 90 Old Barnaby was there and Orapahim, Anca, Martin Tonasket and one other chief there that represented all the tribes. I forgot his name, but all the tribes were represented there. I wanted to address them and they wanted to hear me, but Captain Webster denied me the privilege. He said he did not want me to talk to them. I went over to see some half and quarter breeds that I knew very well, as I have visited them, and talked to them there. I talked to them about extending the Maish and Gordon Contract. I told them that we had other parties in now in Washington and that Mr. Robertson was connected with me here, and I asked them to ask the chief to have it extended and they responded that they would be willing to have it extended on my representation to Major McLaughlin and Captain Webster that it was best to do.

Q. At the time of that conference were parties claiming to have secured another contract from the Indians for the identical services that the Maish-Gordon contract was to cover? A. Yes. A. M. Anderson, formerly Indian Agent, claimed to have a contract with the Indians.

Q. Now, Major, state whether or not there was any attempt ever made there for the Indians to repudiate all prior contracts with

reference to services for them as Attorneys? A. All I can state was that the Indians told me that the Agent didn't want them to have any contract with anyone. I wasn't allowed in there when they were sitting in council at all.

Q. Major, did you have the services of an interpreter? A. Yes, I had the services of an interpreter.

91 Q. I will ask you, Major, if you were familiar with the negotiation of the government with the Indians relative to ceding away the rights of the Indians in the north half of the Reservation for \$1,500,000.00 so that you could talk with them in relation thereto? A. Yes, I was familiar with the entire treaty.

Q. When was that made Major, do you recollect? A. It was made I believe, in 1886, just before I had become Indian Agent.

Q. And the Government had repudiated the authority of the three Commissioners to obligate the Government to pay to the Indians this money? A. The three Commissioners here, Major Anderson was one of them, the other two I forget the names, made the treaty with the Indians, and I believe Congress confirmed the treaty.

Q. You mean by that that Congress enacted a law restoring the north half of the Colville Indian Reservation to the public domain. In that Act failing to compensate the Indians as agreed? A. Failed to keep up their part of the contract entirely. Their contract was to pay them \$1,500,000.00 and give them 81,500,000.00 acres of land in five annual payments.

Q. Now, Major, under the treaty that McLaughlin was negotiating, was that relative to opening the south half of the Reservation? A. I don't know what his treaty was. I don't know what he was trying to do. He didn't want me in there.

Q. What I mean is Major, is it a fact that the government seeking to obtain from the Indians the opening of their lands without the Indians insisting upon the payment of this money before they should negotiate with the Government further with reference to the opening of the South half of the Colville Reservation? A. The Indians wouldn't agree to what they wanted. What they wanted I don't know. The Indians refused to have any further contract until the treaty they had with them had been carried out, which the government had never carried out.

Q. What did you do with reference to that matter with reference to advising the Indians on that point at that time? A. I advised them to stay by the old contract, and that Mr. Robertson and myself and Gordon and his associates in Washington would carry the thing through under the Maish-Gordon contract.

Q. State whether or not you were instructed, if at all, with reference to preventing the Indians from entering into new negotiations until the Government recognized the former claim? A. Yes, I was instructed to keep the Indians for the old contract and not to make any new treaty or contract until the terms of the old treaty was fulfilled.

Q. That is until they got their \$1,500,000.00 they should not agree

to the opening of the South half of the Colville Reservation or the Spokane Reservation? A. Yes.

Q. Did they heed you? A. Yes, they did; they all went off, some stayed one day; some two days; quite a few in bodies, particularly one member living in Nespelem and Okanogan. I talked with him just as he was going off and I told him not to go away,

and he said, "I am not going to stay for any dam-  
93      treaties until the old treaties are fulfilled. The Government is always lying to the Indians." In all this matter I was working under the Instructions of Frederick C. Robertson and he furnished the money for me to go down there and pay the expenses of the trip.

Q. What if anything did these Indians say with reference to the services that they knew of having been done under the Maish-Gordon contract for their protection? A. After I explained to the Indians what he had done in regard to the contract, they were satisfied and were willing to have the time of the contract extended but didn't want any treaties or contract until that was finished.

Q. Major, in your experience as Indian Agent, with a new contract signed by the Indians against the consent of the Government and without the authority of the agent have been of any effect? A. None whatever.

Q. How do these Indians make contracts on the Reservation? Q. They make contracts with parties through the Indian Agent before the Department in Washington will recognize them at all. You might go upon the Reservation and see every Indian on the Reservation and get them to sign a paper granting you certain rights and privileges; unless you have the Indian Agent's approval, it would not be worth a snap to you. The Government wouldn't pay any attention to it. That was tried on me while I was Indian Agent.

Q. In other words Major, having found that Captain Webster wouldn't permit you to go on and negotiate a new contract  
94      and that the Government was opposed to that, what in your opinion, would have been the result had you attempted to get a new contract in the name of Hugh Gordon or the name of Gwydir and his associates? A. I would have been put off the Reservation if I insisted I would have been put in prison.

Q. And if you had got it would it have been of any good? A. It wouldn't amount to anything.

Q. State Major, if you knew that in addition to Mr. Robertson there were other Attorneys interested in the Maish-Gordon contract working in Washington for the accomplishment of the objects? A. I knew of none in Washington other than those mentioned by Gordon; that is Butler & Vail, Henderson and May. I heard of them through Gordon.

Q. Major, state whether or not you advised Mr. Robertson, if possible, to go to Washington to assist in procuring the recognition of the rights of the Indians by an Act of Congress, giving them \$1,500,000.00 which they claimed to be entitled to? A. I did, with the knowledge of Hugh Gordon, after writing to Mr. Gordon I advised Mr. Robertson to go to Washington to attend to the matter.

Q. State Major Gwydir, whether during the time Mr. Robertson was acting here, as you have indicated, you believed or understood that should he fail to secure a new contract with the Indians he should receive nothing for the work he had done and the  
95 money he had put up. A. I never understood anything of the kind.

Q. What was your understanding as to the relationship of Mr. Robertson to Hugh H. Gordon in the event of a recovery on behalf of the Indians? A. My understanding was Mr. Robertson was standing in equal with Mr. Gordon.

Q. State whether or not you ever at any time informed Mr. Robertson that was or was not your understanding of the contract prior to the time Mr. Robertson went to Washington? A. That was my understanding prior to the time he went to Washington. My understanding of it.

Q. Did you inform Mr. Robertson of that fact as to what your understanding was should be his share in the event of a recovery? A. I did.

Q. What did you inform him? A. I informed him that Mr. Gordon would write him that he was standing in equal on the proposition.

Q. What was your understanding as to what you should receive for the services you were then performing? A. My contract with Mr. Gordon authorized me to negotiate with some lawyer and then to act under the direction of Mr. Robertson.

Q. Did you expect to be paid an additional compensation than the original amount of money? A. I did.

Q. I will ask you to state what Mr. Robertson said, if anything, with reference to your being paid for such services? A. Mr.  
96 Robertson said I would be taken care of and paid. I don't think the amount was ever stated.

Q. I will ask you to state, Major Gwydir, if Mr. Robertson informed you on his return from Washington, that he had agreed with Mr. Gordon with reference to whether or not he or Gordon would pay you for the services you rendered after 1904? A. He did.

Q. What was the statement made by Mr. Robertson to you immediately upon his return from Washington? A. Mr. Robertson said to me that he would take care of me and pay me what was coming to me for the services I had done from 1904 up to the time of settlement.

Q. I will ask you to state if Mr. Robertson said anything to you with reference to whether or not he had made an agreement with Mr. Gordon or that there was an agreement between him and Mr. Gordon to that effect? A. He said there was an agreement between him and Hugh Gordon to that effect.

Q. Major Gwydir, please state what reason Mr. Robertson gave for assuming this agreement to pay you rather than that he and Mr. Gordon should jointly compensate you? A. He said that Gordon didn't seem to take much interest in me. Seemed to think he didn't owe me anything morally or any other way for anything I had done.

Mr. Robertson said that the agreement was that I was to be paid; that is the agreement between him and Gordon.

Q. Did Mr. Robertson state to you at that time as to what he and Gordon were to receive out of the moneys coming to the Attorneys? A. If he did I don't remember the amount.

97 Q. I will ask you Major if Mr. Robertson informed you that when it came to dividing the moneys that were to be received for the fee if Mr. Gordon then insisted that Mr. Robertson should take care of you.

Mr. SCOTT: Object to that as leading and hearsay.

A. Yes sir. That is absolutely correct. That is what Mr. Robertson told me immediately upon his return to Washington. If I remember right, I saw an agreement to that effect.

Q. Now Major, I will show you a letter, dated September 14th, 1908, addressed Major R. D. Gwydir, Spokane Washington, and consisting of two pages written on all sides, signed "Cordially your friend," following the typewritten addition; there is a memorandum in Mr. Gordon's handwriting, and ask you if that letter was received by you? A. This letter he wrote that I had no legal or moral claim against him.

Mr. ROSENHAUPT: I offer this letter in evidence; ask that it be marked for identification as "Plaintiff's Exhibit L."

(The letter was marked "Exhibit L.")

Q. I will now show you, Major, a letter dated "May 21, '03, signed Hugh H. Gordon," and ask if this letter was received by you? A. It was received by me through the mail, and handed to Mr. Robertson. He told me that he would attend to sending the contract called for by Gordon.

98 Q. State whether or not you knew of Mr. Robertson during the last five or six years going upon the Indian Reservation himself at various times? A. Yes sir, I think Mr. Robertson went twice, from my knowledge on the Indian Reservation.

Q. I will ask you to state if you know, of Mr. Robertson having a personal acquaintance with the Indians on the North half of the Colville Reservation? A. Yes sir, acquaintance with some—I guess I introduced them to him.

Q. I will ask you to state if you know Mr. Robertson at any time prior to this sending of you to the Reservation himself discussing this matter with any of the Indians? A. I do. One Indian in particular, a Mrs. Stewart or her husband, I have forgotten which.

Q. Was Mrs. Stewart an intelligent Indian woman? A. Very intelligent Indian woman living on the Reservation.

Q. I will now show you this postal card, dated and signed "Hugh H. Gordon" — ask if you received that in the ordinary course of mails? A. It is Gordon's handwriting and received by me in due course of mails.

Mr. ROSENHAUPT: I offer this postal card in evidence; ask that it be marked for identification as "Plaintiff's Exhibit M."

(Postal card marked "Exhibit M.")

Q. State Major if these Indians made any statement to Major McLaughlin at that conference as to whether or not they wanted to hear you or what standing you had among them. A. Yes, well  
99 I went right into the meeting, but the Agent came in and I was sitting there talking to Captain Webster and the Indians filed in. All the old Indians at the head. We talked with an interpreter Sal Nee, and they all came up and shook hands with me. They gave their usual talk; you couldn't spell it anyhow, and she turned to Major McLaughlin the chief wanted to say something; well, McLaughlin told him to go ahead and say it, and the chief said, "This is a man that never told us a lie, and always treated us fair."

Q. Major, did you in writing anything to Gordon never say you could talk with them in terms of friendship by reason of your former position? A. Yes, I had a good deal of influence with them. I never told a blame one of them a lie in my life.

Q. Major, was any conversation had between you and Mr. Robertson before you went down to that Reservation as to whether or not the agents of McDonald under the Anderson contract might not be seeking to secure a ratification of that contract in council? A. Yes sir.

Q. State what was said with reference to that? A. Mr. Robertson wanted me when I went down there to see what the other people, that is the McDonald outfit, were doing towards getting their contract through with the Indians, and what success they had or what they had done. I found that the Indians, the half-breeds in particular, were very bitter against the whole outfit. They had taken these Indians across the river over to Marcus and got them to sign a paper without letting Major McLaughlin know anything about it. Your contract is practically the only contract.

Q. Major, I will now ask you to state if you have read in letter of September 14th, 1908, this statement by Mr. Hugh 100 Gordon: "Robertson has shown bad faith towards both of us, and I want your help in defeating this suit of his, which is an outrage." I will ask you to state if you have been informed by Mr. Robertson with reference to what steps had been taken in relation to the matter Gordon writes about? A. Yes sir. Mr. Robertson which I showed him that letter told me that I was taken care of, and that he would take care of me in the matter.

Q. Are you satisfied with that statement Major? A. Perfectly satisfied sir.

#### Cross-examination.

By Mr. SCOTT:

Q. Major Gwydir, when did you first confer with Major Gordon about Mr. Robertson? A. In the early part of 1904.

Q. How did you confer with him? A. By letter.

Q. Didn't talk with him personally? A. No, I haven't seen him since 1893.

Q. When did you first engage Mr. Robertson to assist you in this matter? A. Some time in 1904. I couldn't tell the time, probably in July or August, somewhere along there. The letters there all

show that. As soon as I got word from Mr. Gordon telling me that he would consider Robertson in the matter, then I came to Robertson about it. He had written Robertson at the same time.

101 Q. Major, did you show the letters on this subject which you received from Major Gordon to Mr. Robertson? A. I did.

Q. All of them? A. All relating to him, yes sir, and all relating to business. For I considered him an equal partner in it, and entitled to see all the correspondence.

Q. About how many letters did you receive from Mr. Gordon in this matter after the matter of employing Mr. Robertson came up? A. Probably a dozen letters, and maybe not so many—maybe a few more.

Q. Have you all of those letters? A. A part of them are here, Jones wanted some of them in his suit with Gordon. He wanted some of them and I may have given him some.

Q. What Jones? A. W. C. Jones.

Q. Will you try to get these letters? A. I don't know if Jones has them.

Q. Will you please make an effort to obtain and include them in this deposition? A. I will try and do it.

Q. Are there any other letters except the letters which have been introduced in evidence and those which you think may be in the possession of Mr. W. C. Jones, which you received from Mr. Hugh Gordon relative to this matter? A. Well, there is one letter I don't think ought to be put in.

102 Q. Then these letters which have been introduced in evidence this afternoon and the letters which may be with Mr. W. C. Jones and this one letter are all the letters or communication received by you from Mr. Hugh Gordon relative to the matter involved in this action? A. I am not positive but I will make a diligent search and try and find any other letters.

Q. Will you kindly produce all original letters or get those which you have left with Mr. W. C. Jones, and introduce them so they may be made a part of this deposition? A. I will.

RICHARD D. GWYDIR.

In the Supreme Court of the District of Columbia.

In Equity. Consolidated No. 28005. Original No. 28006.

FREDERICK C. ROBERTSON et al., Plaintiffs,

vs.

HUGH H. GORDON et al., Defendants.

*Deposition of Frederick C. Robertson.*

In pursuance of the notice hereto attached personally appeared before James W. Marshall, United States Commissioner at Spokane, Eastern District of Washington, at his office in said City, Frederick C. Robertson, the said hearing having been adjourned from the

12th day of April, 1909, to the 19th day of April, 1909, at 103 the hour of 10:00 A. M. on said day and on said 19th day of April, 1909, at the hour of 10:00 A. M. personally appeared the said Frederick C. Robertson, a witness on behalf of the plaintiff, the plaintiff being present in person and represented by his Attorney, Harry Rosenhaupt, and the defendant, Hugh H. Gordon being represented by Thomas A. Scott, and the taking of — the said Frederick C. Robertson was adjourned until the 20th day of April, 1909 at the hour of 10:00 A. M., whereupon the said Frederick C. Robertson, being first duly sworn to tell the truth, the whole truth and nothing but the truth in the above entitled cause, testified as follows:

Direct examination.

By Mr. ROSENHAUPT:

Q. Please state your name, occupation and residence? A. Frederick C. Robertson. Occupation: Attorney at law, residence Spokane, Wash.

Q. How long have you been a practicing Attorney? A. About 20 years.

Q. Are you the plaintiff in this action? A. I am.

Q. Have you with you the letters and written communications received by you from Major Hugh H. Gordon in anywise affecting or concerning or bearing upon the above entitled action or in anywise effecting concerning or bearing upon the prosecution of the claim of the Colville Indians against the United States as mentioned in the notice to produce letters given in this action by the 104 defendant, Hugh H. Gordon? A. I have and will produce them.

Q. Please state in narrative form as near as you can recall all about the matters claimed in the complaint, and your relations with Hugh Gordon? A. My recollection is that early in the year 1904 Major Gwydir came to me to talk about a contract that Hugh H. Gordon and Levi Maish had with the Colville Indians, which contract had been approved by the Secretary of the Interior and provided 10 per cent. as a fee for recovering for the Indians from the Government \$1,500,000. Major Gwydir had a number of talks with me about the matter, and informed me that Mr. Maish had died, that Mr. Hugh Gordon had removed from Washington and was on a farm in the Southern part of Florida. He also told me that Mr. Hugh Gordon had lost confidence in the men whom he believed were working with him in Washington and wanted some one here to look out for the Indians under the Maish-Gordon contract, and that as this contract was about to expire to assist and advise with reference to the procuring of a new contract or the extension of the old. Major Gwydir informed me that he was fully authorized to enter into any agreement that was necessary to secure my services. He told me that if I went in here and did whatever I thought was necessary that I would expect to have an equal share in the proceeds with Hugh Gordon, as he had removed from Wash-

ton and was then in Florida and in shape to render no assistance at all. Major Gwydir told me later that he had submitted my proposition to Mr. Gordon and that he was fully authorized to enter into this arrangement. I then started in to labor generally for the success, first:

105 secondly: to determine what should be done with reference to a new contract and from time to time I wrote to Mr. Gordon my views of the situation and conferred with Major Gwydir here frequently. Major Gwydir then showed me some correspondence passing between him and Hugh Gordon. This correspondence stated that Butler & Vail had informed him, Gordon, that the Department had refused to grant them permission to go on the Reservation and secure a new contract or a continuation of the old. During my services here I examined the questions of law involved in the claim of the Indians. I made numerous trips to the Reservation, not all strictly in this work, but always talking to the Indians wherever I could get a chance about the chances of recovery, and letting them know that I was retained by Mr. Hugh Gordon in the matter. I visited the south half of the Reservation, near Hunters, Washington, and conferred with numerous Indians about the original treaty and their understanding of it. I talked fully with Mrs. Engeline Stewart at Marcus, Washington, an intelligent quarter breed and she talked with other Indians, two or three chiefs, and I also talked with two of the chiefs on the Colville Reservation about the matter; one of them named Aeneas, as I recollect. The government had negotiated the treaty with these Indians for the sale of this land with three Commissioners, but afterwards the Government claimed that this Colville Reservation was not originally Indian land, but was created out of the public domain, and hence the Indians had no title to extinguish. The Reservation, my recollection now is, was created by an executive order or grant. In 1892

106 by a rider to the appropriation bill through the efforts of John L. Wilson largely, the North half of the Reservation

was open to mineral entry and in 1895 formerly restored to the public domain without compensation to the Indians. I believe that an authority could be obtained either by an Act of Congress or with the consent of the Indian Department to bring an action in the Federal Courts in some manner seeking to establish the legality of the Indians' claim, and wrote my views on this subject to Mr. Hugh Gordon. I now produce the first letter I wrote to Major Hugh Gordon as near as I recollect, producing the original copy thereof from my office files, dated May 9th, 1901, the original being duly addressed and mailed to Mr. Hugh Gordon.

(Offered in evidence and marked "Exhibit N".)  
No objection.

(Continuing:) I discussed with Major Gwydir very fully my views as to a new contract. In the first place the execution of a new contract would be a repudiation of the Maish-Gordon contract. That is, it would be a repudiation of any further service being recoverable under the Maish Gordon Contract. Secondly: I didn't desire to

make any contract in relation to this matter in which contract the parties such as Butler & Vail and other Attorneys who have rendered service for these Indians in Washington, would claim that was in bad faith. I was United States Attorney for a number of years and tried numerous cases involving Indian contracts. I felt certain after the Department had refused Butler & Vail the right to execute a new contract that if we clandestinely went on the Reservation and pretended to sign individual Indians that the Government by De-

partmental action might formally revoke the Maish-Gordon  
107 contract. In my opinion, as I informed Major Gwydir, the

Maish Gordon contract constituted the only equitable relations between Hugh Gordon and his associates and the Indians, because Maish having died the contract ipso facto was abrogated unless continued by a new agreement, and Gordon having removed from Washington, could not, as I viewed it, claim services at that time, except in connection with other lawyers, and I could not see the benefit of putting out Washington Attorneys who had been pursuing this contract as Gordon suggested, yet I, could not work with the Washington Attorneys because Mr. Gordon expressed distrust, as set forth in his letters. In a letter of April 22nd, 1904, presented to me by Major Gwydir, Mr. Gordon wrote with reference to Butler & Vail: "As I wrote you, it looks like a deliberate fraud to break us down. If I had had the remotest idea that they were not dealing with me in good faith, I would never have left Washington." He further wrote that that new contract should be taken in the name of R. D. Gwydir and associates. He also indicated in his letter that we ought to wait until there was a change of administration, but the change of administration not having yet arrived, the condition he indicated did not arise, and from the tone of his letter, I felt necessarily limited to advising with Major Gwydir, with Mr. Gordon at the other end of the line and notified the Major from time to time as to what was doing. Indian Agent Anderson after he was removed, knew of the expiration of the contract, and went on the Reservation and claimed to have obtained a new contract with the Indians. Of this fact, however, I did not learn for a long time, as it was kept

secret here. Mr. R. W. Nuzum, Judge M. J. Gordon, Mr.  
108 Anderson, I think, and several of the Indians I think, went to Washington and labored with the Committees of the Senate, but unsuccessfully. I then, for the first time, learned that they claimed to have some kind of a contract with the Indians for the same service that Gordon and I were claiming to have the authority to act here. I then discussed the matter with Mr. R. W. Nuzum but entered into no arrangement with him. He informed me however, that he had entered into some deal under the new contract with Butler & Vail, so that Butler & Vail stood in the position, as I believe, of having the right to claim that they worked, first, under the old Maish-Gordon contract, and secondly, under the new Anderson contract, and should the Department approve the new Anderson contract, I felt that our rights would be seriously prejudiced unless we had the full and cordial understanding with Butler & Vail.

Along in the Fall of 1905, the Government called a Conference of all the tribes of Colville Indians who had executed the old Maish-Gordon contract. This was called at Fort Spokane, the Government Fort at the Junction of the Spokane and Columbia rivers. This conference had for its object the procurement of the consent of the Indians to open certain other Reservation lands in which they were interested. A gentleman by the name of Major McLaughlin as I understood, with plenary powers, was going to negotiate this treaty, and this was to be the largest Indian meeting that had been had in this country in the last ten or twelve years, as near as I can recollect. I then concluded that it was of the utmost importance to send some one there to protect the interests of Hugh Gordon and myself, whom

I considered jointly laboring in this matter as equal partners,  
109 and I sent for Major Gwydir and gave him full instructions and sent him there. As I well knew his diplomacy, and I might say his distinguished appearance, and fidelity as an Indian Agent rendered him a man of exceptional value. I think I advanced him \$50 or \$75. I instructed him to prevent at all hazards the approval of the Anderson contract by the council of Indians. That if the Indian Agent and Mr. McLaughlin would give him authority to talk to the Indians to explain to them that Butler & Vail, Hugh Gordon and others, with myself, were actively working for their interests under this old contract, but I told him to do nothing clandestinely, because the Government would repudiate it and all the rights of Gordon and myself might be lost. I prepared for the Major a paper to have the Indians sign if he thought it could be done at that time. I drew this contract in the name of Hugh Gordon and his associates instead of R. D. Gwydir and his associates, because I believed it was a fair and legal thing to do.

I now offer this contract in evidence, and ask it to be marked "Plaintiff's Exhibit O".

No objection.

(The same is marked Exhibit O".)

(Continuing:) Major Gwydir wrote me a letter while at the Conference in relation to the McLaughlin treaty, which letter I now offer, dated December 4th, 1905, from Major Gwydir.

(Offered in evidence and marked "Exhibit P".)

(Continuing:) The point of Major Gwydir's presence there was this: I told him to instruct the Indians that if the Government was going to deal fairly with them, that they should pay them 110 for this land ceded under a solemn agreement, and favor their claim rather than opposing it, as has been done, and that as a condition precedent to signing anything they should insist that Major McLaughlin should guarantee the payment of this money to them. This, I understand, was McLaughlin's intention, and he and the Department of the Interior after this Conference worked to have the Indians paid this money. In order to warrant performance under treaties I understand Governmental action is required; so that we were continuing to work for the Colville Indians' money,

as before. I introduce a letter dated January 8th 1905, and ask that the same be admitted in evidence.

(The said letter was marked Plaintiff's Exhibit Q.)

(Continuing:) I received a letter from Hugh Gordon in February 1905, which letter I now introduce in evidence, the letter dated February 8th 1905, and ask that the same be admitted.

(Said letter is marked "Exhibit R".)

(Continuing:) On March 10th, 1906, I wrote, signed, post-paid and mailed a letter to Hugh H. Gordon, a carbon copy of which — from my office files, I now offer in evidence, and ask that it be admitted.

(Said letter is marked "Exhibit S".)

(Continuing:)—and attached to this letter is a telegram dated Miami, Florida, March 8th, 1906; "F. C. Robertson, Attorney at Law, Spokane. Can't promise success. Will do my best. Require full information. Send One hundred and fifty. Am writing. Hugh H. Gordon." (Continuing:) I also offer this in evidence, in connection with the last letter, and ask that it be marked for identification Exhibit "S".

The same is marked "Exhibit S."

(Continuing:) Gordon mentioned in a letter he wrote me or Major Gwydir I forget which, that we were seriously handicapped because we were unable to meet more closely in conference, and wished me to come to Washington, if possible to confer with him on the situation. The matter of the Indian claims were then pending before Congress, and all the assistance of everybody was needed, we believed, because if it was defeated then Congress would probably not revive the matter, as it had been pending about twelve years, and nothing had been done. So I, although very busy in the midst of a lawsuit and on the same train with Mr. Nuzum, went to Washington with him, traveling together, but under no agreement, except that we were both working for the success of the Indian Claims. I knew nothing personally about the validity of his contract. When we got to Washington I met Mr. Hugh Gordon, who had received the money from me and was there for conference, and Messrs. Butler and Vail, and Mr. R. W. Nuzum. I had numerous talks with Mr. Gordon, who was claiming to be the sole surviving partner under the Maish-Gordon contract, and was claiming in effect that Butler & Vale had but a small, if any, interest in the contract. I then became aware that Butler & Vale had performed nearly all of the services there in Washington that had been performed by anybody, and that they had worked with Judge M. J. Gordon and Mr. Nuzum, and that the Indians had been before the Department and undoubtedly had impressed the Department that their claims were just;

that all the expenses had been paid by Nuzum, and I informed Major Hugh Gordon that in my opinion these equities were strong, and advised if possible a unity of action between all of the Attorneys. Gordon and I looked up the law and I worked

independently, briefing the case on behalf of the Indians. I also looked up all of the law with reference to the Maish-Gordon contract, and the standing of Hugh Gordon, and impressed upon him the necessity of sizing the situation up so as to present the Indians' claims by a solid bunch of lawyers working for them, rather than a bunch of disputants over the matter, and Butler & Vale, who were getting more than Mr. Gordon was, were willing to concede to that. Major Gwydir had rendered us services here concerning which Major Hugh Gordon and I talked, and I thought that we should compensate him. I then told him we had best put our contracts in writing, so that in any negotiations that might occur we would know where we were at, and that he and I at least should stand upon our footing as equal partners against everybody. He agreed with me and a written contract was prepared on the 28th day of March, 1903.

I now offer in evidence the contract signed by myself and Hugh H. Gordon. It is partly in typewriting, and at the bottom of the contract in writing is the words: "The fees to be divided between said Robertson and said Gordon as herein provided shall be the net sum accruing to said Gordon after settling with other attorneys under contracts heretofore made by said Gordon." I wanted a contract dividing everything equally between Gordon and I, but he insisted that he had had longer service under the Maish-Gordon, and that I should pay Mr. Gwydir for what services he had rendered us. I agreed, and then he said to me, "Robertson, I agreed to give you back the \$150.00 out of my share of the profit. You should waive 113 that claim against me," I said al-right Mr. Gordon. That is all right, and the way you view it, I am willing to give a little in this matter and will do so." So we signed a contract. I now offer in evidence this contract.

The said contract is marked Exhibit T.

Butler & Vail were claiming that they had rendered all the meritorious services rendered to the Indians in Washington; that they had filed written briefs; gone before Committees; watched the litigation; incurred certain obligations with cert; in other attorneys, and were entitled to the big end of the compensation. Mr. Gordon was claiming that both he and Mr. Maish had rendered meritorious services; that other persons had rendered meritorious services; that I had prevented the Indians from repudiating the contract, and had rendered meritorious services, all of which inured to his benefit and to myself; and that Butler's claims were exorbitant. So that we could not get to a basis of agreement between ourselves, as to what Butler & Vail should have. We then tentatively entered into the agreement to submit to the conference committee the attorneys' claim on a quantum meruit, so that the conference committee should determine what the attorneys should have. Gordon and I having agreed that whatever we got, no matter how or when, or under what contract, would be equally divided. It was mutually satisfactory to us. We went before members of the Conference Committee. Myself and Mr. Hugh Gordon went to the committee room and had a talk with Senator Dubois of Idaho, who was on the conference committee, with Sen-

ator Clapp, I think of Minnesota, and Senator McCumber, who said, "Gentlemen, this conference committee will not have anything to do with disputes between lawyers. The Senate of the United States is not a trial court, and its committees never promote conflicting claims that have to be litigated. If you gentlemen have a meritorious claim it is my advise to let the matter be determined by some other tribunal." Of course, we took this advise. Then we discussed the arrangement for division of the fees: Hugh Gordon and I treating with Butler & Vail and Nuzum as if equal partners. We signed up a written contract, a copy of which I have not. I recollect that Mr. Hugh Gordon signed it in his own name, and Butler & Vale signed it in their own name, and Nuzum signed it in his own name, and I think Vale and Butler, Nuzum and Nuzum, and possibly Hugh Gordon added the words "and associates" in that contract. My recollection is that Gordon and myself was to receive \$18,500, I know the amount was exactly equal that we were to receive, Nuzum for himself and associates the same, and Butler & Vale the remainder, to take care of the claims arising by reason of the employment of other lawyers. Mr. Butler stated that he had employed other lawyers than those employed by Mr. Hugh Gordon. The contract being signed and my rights set forth in there equal with that of Mr. Hugh Gordon, we proceeded to labor for the passage of this bill, and were assured that all opposition had been withdrawn, and that the bill would pass. Butler & Vale then had the compensation to attorneys made payable through them.

Mr. Gordon sent me a receipt from Biscayne, Florida, dated March 21st, 1906, signed by himself and in his hand-writing, acknowledging the receipt of \$150.00.

I now offer this in evidence and ask that it be marked Plaintiff's Exhibit U.

The same is marked Exhibit U.

I now offer in evidence a letter, dated Biscayne, March 10, 1906, addressed to F. C. Robertson, and signed Hugh H. Gordon.

The same is marked "Exhibit V."

I now offer in evidence a telegram, dated Miami, Florida, March 20th, 1906, addressed to F. C. Robertson, and signed Hugh H. Gordon.

The same is marked Exhibit W.

Also offer in evidence a telegram, dated Miami, Florida, March 23, 1906, addressed to F. C. Robertson, and signed Hugh H. Gordon.

The same is marked "Exhibit X."

Shortly after my return from Washington I received a postal card from Mr. Hugh H. Gordon, dated, Washington, May 26, 1906, signed Hugh H. Gordon, I now offer the same in evidence and ask that the same be marked for identification.

The same is marked "Exhibit Y."

I might say that my recollection is that Judge Mark Fullerton was one of the original commissioners appointed to treat with the

Indians, and there was a strong letter from him urging the justice of this claim. I talked over with the attorneys in the case, and with several members of the conference committee the fact that there was an apparent misunderstanding as to the equity of these Indians. I had been all over the Reservation, and explained the great value of these lands. Some of it possessed valuable mines. I knew one on

the Reservation worth more than the Government paid the  
116 Indians; that is as I thought. Republic Camp was there

and all of these matters were discussed generally, urging the justice of these claims. I personally called on several members of Congress and Senators, informing them of the justice of the Indians' claim and incidentally the contract for attorneys' fees. I had arranged with Mr. Hugh Gordon and Mr. Murum in order to size up what was best to be done. I spent approximately a month away from home on this trip, and my expenses were such as would be incurred on a trip of this character. When the bill passed, then it became necessary for the lawyers to establish that services had been performed for the Indians. I understood that this case would be brought in the name of Butler & Vale, which it was, and that when they recovered compensation there would be some opportunity for the lawyers to then appear and determine their rights. The case was pending without any intervening petition, so far as I am informed until some time in the fall of 1903, when Assistant Attorney General Anderson representing the Government, and Mr. Vale representing himself as I understood, as the party named to act for all concerned came to Spokane and took testimony here. I testified in part as to the service I had rendered, and assisted in the preparation of the case, showing all of the services rendered by all of the lawyers. We procured Judge Turner's testimony that the services of the attorneys, my services being included in the hypothetical question, as well as the services of Mr. Hugh Gordon, as I recollect, were worth the sum of \$150,000 and more. I then asked Mr. Vale, "Mr. Vale,

what is your construction of this Act? Should I intervene in  
117 the courts, or Gordon intervene?" and he said, no, that all

intervention would be stricken out, in his opinion, and he thought we would complicate matters in the case and further told me that, "You and Gordon are protected under your contract with us, and we will carry it out in full." This contract was left with Mr. Vale or Mr. Butler when I left signed by everybody, but I had no copy and hence relied on the copy retained by Butler & Vale; and on October 3, 1903, I wrote a letter to Mr. Gordon, the office copy of which I offer in evidence, which was addressed, postage paid and transmitted to Mr. Gordon.

Letter to Mr. Gordon, dated October 3, 1903, Marked "Exhibit Z."

I paid, I think, one third of all stenographers' fees here for the testimony. I never heard from Mr. Gordon in response to that letter, and believed that he was acting under it at all times. I never knew that he was going to appear in the Court of Claims by an intervening petition. In fact, I was never informed by Mr. Vale or Mr. Butler or by Mr. Hugh Gordon or by anybody else of any steps of that kind being taken, so I took no steps to submit before the Court

of Claims my contract with Mr. Hugh Gordon mentioned, and it was not produced at any hearing or anywhere else. I considered the matter settled and took no concern as to what my associates were doing in the Court of Claims, looking to my contract with Mr. Hugh Gordon and the jurisdictional net as to my rights. I did see the pretended testimony of Mr. Hugh Gordon which did not mention a contract with me, but I think went as far as to state that he had no contract with anybody. This was in April 1907. I then 118 went before U. S. Attorney Avery, and dictated an affidavit, which is attached to several of the Exhibits that have been introduced, and which I swore to on the 15th day of April, 1907, before the Notary, which I now offer in evidence and ask to be marked "Plaintiff's Exhibit A1."

The same is marked "Exhibit A1."

Upon my giving this affidavit I dictated a letter to Messrs. Butler & Vale, which I never signed or sent to them individually, but which I sent to George H. Patrick, my attorney in this case later. I now offer that in evidence and ask that it be marked "Exhibit A2."

The same is marked "Exhibit A2."

And I also offer in evidence a letter addressed to George M. Anderson, Washington, D. C. and ask that it be marked Plaintiff's Exhibit "A3."

The same is marked "Exhibit A3."

On April 20th, 1907, I wrote to George H. Patrick a letter, the original carbon duplicate of which I now offer in evidence, which letter contained in addition thereto the affidavit I made just referred to, together with the copy of the letter to the attorney general and to Butler & Vale, above mentioned.

Mr. Scott: I desire to object to this on the ground that it was not the best evidence, and to the introduction of Exhibits A2 and A3 on the same ground.

The said letter marked "Exhibit A4."

I may state that these letters and papers that I am now using have been returned to me by Mr. Patrick for use in making this deposition and were in his possession until I just received them. During the year 1903 I had some correspondence with Messrs. Butler & Vale, and also wrote several letters to these attorneys. I received a letter on July 25th, 1903, signed Butler & Vale by J. M. V., and in response thereto I wrote to them a letter, a carbon copy of which I hereto attach. I now offer Butler & Vale's letter of July 25, 1903, and my reply thereto, and ask that they be marked Plaintiff's Exhibit A5 and A6, respectively.

Mr. Scott: Object to carbon on the ground that it is not the best evidence.

The said papers are marked Exhibits "A5 and A6."

On November 11th, 1907 and in response to my inquiry as to whether or not I should intervene, I received a letter addressed to

F. C. Robertson, dated November 14, 1907, signed J. W. Vale. I now offer the same in evidence and ask that it be marked Plaintiff's Exhibit "A7".

The same is marked "Exhibit A7".

Throughout the entire case, after the agreement with Mr. Hugh H. Gordon, introduced in evidence, made in Washington I acted for himself and myself under that contract, with it as a measure of our rights, and Mr. Gordon was to remain in Washington until he got ready to go home, and I agreed with him to do everything on the ground in the State of Washington looking to taking all of the testimony and the preparation of this end of the case under the act of Congress to show services under this contract. There never was any discussion between myself and Hugh Gordon in Washington about procuring other contracts with the Indians thereafter. The bill was in conference by the Senate and the House that would finally determine their rights. And the statement in

the answer of Mr. Gordon that such was the purpose of this  
120 contract is not true. I acted with Hugh Gordon both under

the Maish and Gordon contract and independently thereof under this agreement and the previous agreement with Major Gwendit, and while my compensation was to be equal with him in the new contract, if one was produced, the same measure of division it was distinctly understood and agreed by Hugh H. Gordon and myself should obtain no matter whether the Maish Gordon contract was taken into consideration or we worked under a quantum meruit, or we worked individually, as we discussed the matter from time to time, our interests were identical, and I never heard any statement by anybody when in Washington that anybody was to seek to again negotiate with the Indians. The Department had absolutely stated that no recognition would be given any new contract with the Indians. They were claiming that the Department itself had been the active agency in securing this legislation for the Indians. I knew, and Gordon knew, because we discussed it, that we had to stand upon the case as made. The only knowledge I ever had about Gordon's claimed intervention was from Butler & Vale, and they assured me that everybody's rights would be fully protected. I never had any agreement with Mr. Hugh Gordon at any time modifying or changing the written contract. Our agreement was then and there crystallized into this contract after considerable discussion, and I have claimed under it ever since, and Gordon never wrote to me at any time and never told me at any time and I never learned at any time that he was claiming that this was another agreement to procure a new contract until he set it up in his answer. I have written several letters to my counsel, Mr. George

H. Patrick, and these are all of the letters or carbon copies  
121 of letters that I now find. I took some of the original papers

to Washington, and have only introduced such as I at this time am unable to locate. I never presented any of my claims to the Court of Claims. I was here in Spokane, saw no decision, and had no copies of the records mailed to me, and except through Butler & Vale as I have indicated, and I acted entirely under their

advise until I wired to Mr. Patrick the day the findings were made, the telegram and letters I presume he has to protect my rights in any manner he sees fit. After my conference with Mr. Vale here I rested satisfied that both Gordon's interest and my own would be protected by them in the final distribution. I have received, however, no monies whatever. I took this action because I was satisfied that Hugh H. Gordon was repudiating his agreement with me and would get this money beyond the jurisdiction of the District of Columbia, so that I could not reach it. I have incurred expenses in procuring attorneys and other expenses incident to this litigation as a result of the action of Mr. Gordon as before mentioned in denying my rights under the contract with him.

Cross-examination.

By Mr. SCOTT:

Q. In the course of your testimony just given you mentioned a change of administration, and stated that the reference to this change of administration was made by Mr. Gordon either in a letter to yourself or to Major Gwydir, can you recall to whom that mention of change of administration was made, and what bearing 122 had it on this case? A. Yes sir.

Q. Will you please state? A. I think it is in a letter to Major Gwydir, and it related to the fond hopes that Major Gordon had that the democratic administration would come into power, and would probably be willing to carry out in good faith the contracts recognized to be just by a former democratic administration.

Q. In reference to Exhibits A2, A3 and A4, being letters of yourself to Butler & Vale and to George M. Anderson, under date of April 15th, 1907, and your letter to George H. Patrick under date of April 20th, 1907, what has been done with the original of these letters? A. The letter to George H. Patrick was sent to him and is retained by him now I presume. The letters to Messrs. Butler & Vale and Attorney General *General* George M. Anderson I directed to Mr. Patrick, because after thorough reflection I thought I was sending all of my important evidence to men who, while I was ready to confide these documents to them would yet not be paid for looking after this matter, and because I thought Mr. Patrick was a careful painstaking man and would write me what the situation was there after investigation. I concluded that he was the proper man to take this matter up and act under the direction of either or both of the gentlemen, or independently, as he saw fit.

Q. Mr. Robertson, did you testify at Spokane Washington, on the 27th day of September, 1903, as a witness in the case of Butler & Vale against the United States in the matter of attorneys fee for prosecuting the claim of the Colville Indians? A. I think I did.

123 Q. I will ask you if the matter contained in the printed record of deposition which I now show you, pages 73 to 82 inclusive is your testimony in that case? A. I haven't examined it. If it is a copy of the depositions that were given there, it is my testimony, for I did give a deposition.

Q. Would you examine it and state whether or not it is your testimony? A. On a casual examination I presume it is my testimony. I haven't read it over very carefully, it is a government document, the original record is on file. It is a long time ago, and I couldn't tell unless I read the original if it is exactly as I said it, I presume it is.

Q. Mr. Robertson were you then asked on cross examination by Mr. George M. Anderson the following question: "Now Mr. Robertson you say you became interested in this case under the Maish-Gordon contract. Now, will you please state as nearly as possible, the exact time when you became so interested and whether you had a contract with them; and if so, will you please file the contract as an exhibit to your testimony?" A. Yes sir, I was.

Q. And Mr. Robertson, did you answer, "Yes sir, I will try. That was, I think it was, in the latter part of 1893. I did not have a contract." A. Yes sir.

Q. Were you asked the question, "In the latter part of 1893?" A. I think I was if it is there.

Q. And did you answer "1903. I did not have a contract but simply looked for a fair division. I was informed by Mr. 124 Gordon that my services would be compensated by Mr. Hugh H. Gordon who was the living member of the Maish-Gordon contract equally with him". A. I think I did. I think there should be a correction there. I think the first part, "I was informed by Mr. Gordon" I think it should be by Gwydir. I then answered that I was informed by Mr. Gwydir that my services would be compensated by Mr. Gordon, who was the living member of the Maish-Gordon contract equally with him. Meaning to state that my original understanding was that my services would be paid for equally as were the services of Mr. Hugh H. Gordon to be paid for.

Q. And were you asked the question, "Mr. Maish had died some time before that?" A. Yes sir, I presume I was.

Q. And Mr. Robertson, did you answer, "Sometime before that. My view of the matter was that if I rendered valuable services and rendered them I would be entitled irrespective of that or any other contract, to be paid compensation, because I had to look to the equitable side of it, because Congress could or could not give me money as they saw fit." A. I presume that is my testimony.

Q. Were you asked the question, "Then your employment by Mr. Gordon was entirely verbal?" A. Yes sir.

Q. And did you answer, "Yes sir." A. Yes sir, I think I did.

Q. And Mr. Robertson, were you then asked the question "Nothing documentary?" A. I think so.

125 A. And did you answer, "No sir. I had a letter from Mr. Gordon asking me to look into the matter, and by the way he sent me the original contract so that I could see the terms of the contract. I have this contract here, which I offer." Is that your answer? A. Yes sir, I think it is.

Q. Then Mr. Robertson you testified that your contract with Mr. Hugh H. Gordon was verbal? A. When I say verbal that must not be strictly accurately speaking, probably because he was in

Florida and I was in Washington. Major Gwydir was going these letters and I wrote to Gordon strictly accurate statements by correspondence.

Q. When did you first negotiate with Mr. Hugh H. Gordon in regard to this matter? A. I guess my letters are in evidence, I think it was in May, 1904.

Q. That communication was by mail was it not, Mr. Robertson? A. Yes, mail, I will say candidly that Major Gwydir had come to me several times and said that he had told Mr. Gordon that he should have me in the case, and that he, Gwydir, wanted me in on account of my experience here in that class of work, and during these conversations I told Gwydir that I would expect to be equal with Gordon here if I did this work.

Q. Now Mr. Robertson, you have produced several letters in evidence here during the taking of this deposition; were there any other letters from Mr. Gordon to you, other than those which you have produced in evidence? A. Well, if they are they have been

misplaced. I very rarely keep my own letters, as you know  
126 my office is kept by my stenographer, Mr. Seward, who was  
then and now in the office, and sometimes I am careless and leave my mail around, and he picks it up and puts it away.

Q. Have you made a diligent search or had a diligent search made to know if there are any other letters in your possession from Mr. Gordon? A. I think I have.

Q. That is all.

Redirect examination:

By Mr. ROSENHAUPT:

Q. Please state what, if any explanation you have to make as to your testimony that you have just now been examined about?

A. I stated that I had become interested in the case under the Maish-Gordon contract. That I was informed by Mr. Gwydir that my compensation by Mr. Hugh Gordon, who was the living member of the Maish-Gordon contract, would be equal with him; that is, from the inception of this case it was my understanding that I should share equally with Hugh Gordon the fruits arising from the claim on behalf of the Indians, whether under the Maish-Gordon contract or on any theory whatsoever and I continued to work from 1904 with that belief in mind. I stated that there was no written contract, because the testimony relating to the original employment and did not ask me whether or not I had made a subsequent contract with Mr. Gordon as to sharing this money, and Mr. Vail was conducting this examination of me, in fact taking all of this examination, and I therefore stated the facts responsive to his questions only. I didn't understand then and do not  
127 understand now, that Mr. Anderson was asking me about anything except as to how I became interested originally in this litigation; that is, under what contract I came in. Thus, I stated it was the view of every lawyer here, Judge M. J. Gordon, Mr. R. W. Nugent, and Judge Vail and myself that the compensation would be awarded in a lump sum to Butler & Vail and

that they would pay me if they got all the money, \$9,250.00 and Gordon \$9,250.00, and the MacDonald crowd \$18,500.00 and settle the claims, and that if not, we would all share in the ultimate amount awarded, and therefore my mind was not addressed to the materiality of showing the whole contract between Gordon and myself, any more than I would have shown in that examination the various letters I had with Mr. Gordon and telegrams relating to our relations.

FREDERICK C. ROBERTSON.

Supreme Court of the District of Columbia, Holding in Equity.  
Consolidated, No. 28005. Original, Nos. 28000, 28005, 28006.

FREDERICK C. ROBERTSON and Others, Plaintiffs,  
against  
HUGH H. GORDON and Others, Defendants.

Please take notice that the Plaintiff herein, Frederick C. Robertson, will take the testimony of Frederick C. Robertson, Richard W. Nunn, Richard D. Gwydir, and others, all of whom reside in the city of Spokane, and State of Washington more than one hundred miles from Washington, D. C., the place where the court at which the above entitled cause will be tried is appointed by law to be held, to be read in evidence at the trial of the said cause in the caption set out, on behalf of said Plaintiff Robertson, before James W. Marshall, United States Commissioner, who is not of counsel nor interested in this cause, at his office, in the Hunter Building, in the city of Spokane, State of Washington, on the twelfth day of April, 1909, beginning at eleven o'clock in the forenoon of that day and continuing from day to day, as the taking of the depositions may be adjourned, until completed; and such testimony will be taken in accordance with the provisions of the Acts of Congress in such case made and provided, and the equity rules.

You are requested to be present and cross examine if you desire to do so.

Very respectfully,

GEORGE H. PATRICK,

*Solicitor for Frederick C. Robertson, Plaintiff.*

March 30, 1909.

To Messrs. Andrew Lipscomb and James B. Archer, Jr., Solicitors for Hugh H. Gordon, Defendant.

Mr. Louis A. Pratt, Solicitor for Benjamin Miller, Administrator for Levi Maisch, deceased, Defendant.

Messrs. Charles Poe and Berry and Minor, Solicitors for 129 Indian Protective Association, Plaintiffs.

Messrs. Charles Poe and R. D. Blackstone, Solicitors for R. D. Gwydir, J. W. Edwards and Wendell Hall, Plaintiffs.

To Charles H. Merrillat, Solicitor for Marion Butler and Josiah M. Vale (Butler & Vale), defendants and Cross-Plaintiffs.

In the Supreme Court of the District of Columbia.

Consolidated, No. 28005. Original, Nos. 28000, 28005, 28005.

FREDERICK C. ROBERTSON et al., Plaintiffs,  
vs.

HUGH H. GORDON et al., Defendants.

*Stipulation.*

It is hereby stipulated and agreed between the Plaintiff and the Defendant, through their respective counsel, that the testimony of Richard W. Nuzum, and Richard D. Gwydir and Frederick C. Robertson may be taken orally upon oral interrogatories before James W. Marshall, United States Commissioner for the Eastern District of Washington, who shall have the use of a Stenographer to extend the said testimony in typewriting and that the certificate of the said James W. Marshall in the manner and form as herein set forth shall be deemed a good, sufficient and valid certificate in compliance with the laws of the United States and the rules and provisions of the above entitled Court.

130 The said stipulation being orally entered into in the presence of the said James W. Marshall,

HARRY ROSENHAUPT,

*Atty for Plaintiff.*

THOS. A. SCOTT,

*Atty for Hugh H. Gordon.*

In the Supreme Court of the District of Columbia.

In Equity. Consolidated, No. 28005. Original, Nos. 28000, 28005, 28005.

FREDERICK C. ROBERTSON et al., Plaintiffs,  
vs.

HUGH H. GORDON et al., Defendants.

STATE OF WASHINGTON,

*County of Spokane, ss:*

Be it known that an examination of witnesses begun and held on the 19th day of April, 1909, when the depositions hereto attached were taken, I, James W. Marshall, a United States Commissioner for the Eastern District of Washington, duly appointed, qualified and acting as such caused to be personally present before me at my office No. 402 Hutton Block in said City and County, the following named witnesses, viz.: Richard W. Nuzum, Richard D. Gwydir, and Frederick C. Robertson on the 12th day of April, 1909, in a certain

case now pending in the Supreme court of the District of Columbia wherein Frederick C. Robertson is plaintiff and Hugh H. Gordon, Marion Butler and Josiah M. Vale, indi-

vidually and as partners under the firm name and style of Butler & Vale, George B. Cortelyou, Secretary of the Treasury, James R. Garfield, Secretary of the Interior, Charles H. Treat, Treasurer of the United States of America, are defendants, and the said cause was by me continued until the 19th day of April, 1909, at the hour of 10:00 o'clock A. M.

Attest:

J. W. MARSHALL,

*U. S. Com.*

HARRY ROSENHAUPT,

*Att'y for Plaintiff.*

THOS. A. SCOTT,

*Att'y for Hugh H. Gordon.*

In the Supreme Court of the District of Columbia.

In Equity. - 28003

FREDERICK C. ROBERTSON, Complainant,

vs.

Hugh H. Gordon et al., Defendants

*Notice to Produce Letters.*

To Hugh H. Gordon, and to Thomas A. Scott, your attorney.

You are hereby notified to have with you at the time of the Examination of Frederick C. Robertson before United States Commissioner, James W. Marshall, in the Union Building Spokane,

Washington, at 10 o'clock, April 20th, 1909, and at 1:30 that time to produce any and all letters and written communications received by you from Frederick C. Robertson in any wise affecting or concerning or bearing upon the above entitled action, or in any wise affecting, concerning or bearing upon the prosecution of the claim of the Colville Indians against the United States.

In case of your failure to produce aforesaid letters or written communications secondary evidence thereof will be produced at the trial of the above entitled action.

Dated this 20th day of April, 1909.

FREDERICK C. ROBERTSON,

*Complainant.*

Received copy hereof this 20th day of April, 1909.

THOS. A. SCOTT,

*Att'y for Hugh H. Gordon.*

In the Supreme Court of the District of Columbia.

Consolidated No. 28005. Original No. 28000, 28006.

FREDERICK C. ROBERTSON et al., Plaintiffs,  
vs.

HUGH H. GORDON et al., Defendants

*Certificate.*

STATE OF WASHINGTON,

*County of Spokane, ss:*

133 I, James W. Marshall, United States Commissioner for the Eastern District of Washington, duly appointed, qualified and acting as such, do hereby certify that in pursuance of the annexed notice and authority to me directed the depositions hereto attached were taken down by a stenographer in my presence reduced to writing in the presence of, and from the oral statement of, the witnesses in answer to the oral interrogatories herein set forth and propounded to each of said witnesses respectively at the time and place designated in the caption above, and after the said depositions were reduced to writing, the same was then and there by me read over to each witness examined by me hereunder and by said witness subscribed in my presence and in the presence of no other person; the witnesses having been by me first duly sworn to testify the truth, the whole truth and nothing but the truth touching the matters at issue in said cause in each and all answers to the said interrogatories and cross interrogatories; the said plaintiff being present in person and by his attorney Harry Rosenthal and consenting to the said manner of taking the said deposition, and to the form of this certificate; and the said defendant, Hugh H. Gordon being present by his attorney for the purpose of taking this deposition, Thomas A. Scott, and consenting to the manner of taking thereof and to the form of this certificate; in pursuance of which said stipulation this certificate is made.

I further certify that the Exhibits identified in the testimony of the witnesses, and lettered Exhibit A to Exhibit Z, inclusive and to Exhibit M1 to Exhibit M7, inclusive were each and all offered and received by me in evidence and by me at the time of 134 taking said depositions marked as shown thereon, and are hereto attached, and incorporated in said depositions as a part thereof.

I further certify that I am not of counsel for any of the parties to said cause, or in any manner interested therein; that the fee for taking the said deposition, \$12.50, has been paid me by the plaintiff, and that the same is just and reasonable.

Given under my hand this 28th day of April, 1909.

[SEAL.]

JAMES W. MARSHALL

*United States Commissioner for the  
Eastern District of Washington.*

## EXHIBIT A1.

Filed May 6, 1909.

In the Supreme Court of the District of Columbia.

STATE OF WASHINGTON.

*County of Spokane, 88:*

F. C. Robertson, being first duly sworn, deposes and says:

I am the F. C. Robertson, who has previously testified in this case. In my testimony previously taken I referred to the payment of \$100.00 to Mr. Hugh Gordon. I now offer in evidence the receipt signed by Mr. Hugh Gordon and ask that it be marked as a part of this deposition for the purpose of being transmitted to the Court of Claims.

(Same is marked Petitioner's Exhibit 1.)

I now produce the contract which is signed by Mr. Hugh H. Gordon and myself in Washington City on March 28th 1903. This agreement has always been in force and now is in force, not having been abrogated and is a private agreement between myself and Mr. Gordon. I also offer this and ask that it be marked as a part of this deposition.

(Same is marked Petitioner's Exhibit 2.)

I also offer as part of this deposition a letter by Mr. Hugh H. Gordon received by me in March 1903 relating to our trip to Washington. This I ask to be identified as part of this deposition.

(Same is marked Petitioner's Exhibit 3.)

I also offer as part of this deposition two telegrams received by me from Mr. Hugh Gordon and ask that they be marked as a part of this deposition.

(Same are marked respectively Petitioner's Exhibits 4 and 5.)

I also offer as part of this deposition a postal card written by Hugh Gordon to myself relating to the contract.

(Same is marked Petitioner's Exhibit 6.)

I also offer the original contract, or a copy of it sent to me by Mr. Hugh Gordon, which advised me concerning the matter, and ask that it be marked as a part of this deposition.

(Same is marked Petitioner's Exhibit "7".)

I never had any agreement with Messrs. Nuzum, Judge Gordon, MacDonald or Anderson, or claimed any interest under their contract and knew nothing about its genuineness. Mr. Nuzum, however, and myself worked in connection with the other parties to accomplish the object of the Indians' claim. I have numerous other letters from Mr. Gordon to me which I do not introduce as I have covered the matter in my former testimony.

I give this testimony in the presence of the United States Attorney, and submit it for the consideration of the Attorney General, and the firm of Messrs. Butler & Vale, and request that the same be submitted to the Court of Claims in order that my rights may be adjudicated, and the amount of money coming to me, as well as to

Mr. Gordon, be determined in the light of the testimony and those exhibits; the matter not being believed by me to be material in my original testimony, and only upon reading Major Gordon's deposition in which I see no reference to these contracts, do I ask that this be considered as part of the records in this cause.

137 Mr. AVERY: You can add to that that the United States Attorney is taking no part, and does not consider he has anything to do with this matter, or this deposition, except being present in the room when it is given; and that his presence in the room is not for the purpose of being present when the deposition was given, but because of his casual presence therein; and that he has paid no attention to the testimony or exhibits offered, and has examined neither.

F. C. ROBERTSON

Subscribed and sworn to before me this 15th day of April, A. D. 1907.

[SEAL.]

HARRY ROSENHAUPT,

*Notary Public in and for the State of Washington,*

*Residing at Spokane, Washington,*

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EXHIBIT "N."

*Pet'n'r's Ex. 1.*

\$150. 00.

BISCAYNE, FLORIDA, March 21st, 1906

Received of F. C. Robertson, of Spokane, Washington, one hundred and fifty dollars, with which to pay expenses of trip to Washington, D. C. to look after the interests of Gordon Gwydir & Robertson in the matter of the claim of the Indians, of the Colville Reservation against the U. S. Government. In case we succeed in collecting said claim, I agree that out of my share of the profits, I will repay to said Robertson the said one hundred and fifty dollars (\$150. 00.)

HUGH H. GORDON.

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EXHIBIT "T."

*Pet'n'r's Ex. 2.*

MARCH 28, 1906.

It is agreement made between F. C. Robertson and Hugh H. Gordon, witnesseth, that they shall share equally in all monies, appropriated by Congress, or allowed by the Interior Department which may accrue to said Gordon or said Robertson as attorney fees, growing out of the rendition of services to the Colville tribe of Indians, whether, allowed under the Maish-Gordon contract with said tribes, or on any other theory whatsoever, which said interest is to inure to either party, no matter in whose name such allowance is made. Both parties hereto to mutually labor to secure such allowance. Out of

said Robertson's share he agrees to compensate R. D. Gwydir, by a reasonable compensation. The fees to be divided between said Robertson & said Gordon as herein provided shall be the net sum accruing to said Gordon, after settling with other attorneys under contracts heretofore made by said Gordon.

F. C. ROBERTSON,  
HUGH H. GORDON.

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## EXHIBIT "V."

*Pet'n's Ex. 7.*

BISCAYNE, FLA., Mch 10th, '06.

Hon. F. C. Robertson, Spokane, Wash.

MY DEAR SIR: Your telegram of 7th inst. reached me by mail from Miami on morning of 8th. I replied on same date telling you that I would go to Washington and do my best but could not promise success. I asked for full information and proofs of any allegations of serious — that we might make—We ought to have a well defined program of the campaign we propose to make in Washington and it is a great pity that our consultations must be had through the very slow and unsatisfactory medium of correspondence—You and Gwydir who are on the grounds must strengthen my hands with the strongest case you can make out and you must also write me fully making such suggestions as may occur to you.

In my telegram I suggested that you send \$150. I think that isn't will be sufficient. It will cost about \$75 for traveling expenses—that is for the R. R. fare and sleeping car with meals and other incidentals en route, to be added—The uncertain element is the time that it will be necessary to remain in Washington. I am frank to say that I have many misgivings about the issue. It is going to be very difficult to induce the Department to set aside the other parties

and give us leeway unless we can present an exceptionally strong case.

It is very unfortunate that I must leave here at this time. It is the critical point in the season, and I fear my interests here will suffer. But I will go and do my best. Send me complete data and your suggestions. Regards to Gwydir.

Yours, &amp;c.,

HUGH H. GORDON.

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## EXHIBIT "W."

*Pet'n's Ex. 4.*

The Western Union Telegraph Company

Received at 618 Riverside Ave., Spokane, Wash. 175. CH.  
EW. D. 9 Paid. 353.

MIAMI, FLA., Mch 20, 1906.

Hon. F. C. Robertson, Attorney, Spokane, Wash'n:

Detained in court till after April third notify Nuzum.

HUGH H. GORDON.

7:21 P.M.

143

## EXHIBIT "X."

*Pet'n's Ex. 5.*

The Western Union Telegraph Company.

Received at 618 Riverside Ave., Spokane, Wash. 107. CH  
V9. S. 10 paid. 287.

MIAMI, Fla., Mar. 23, 1903.

Hon. F. C. Robertson, Atty at Law, Spokane, Wn:

Leave Sunday night Washington Tuesday write raleigh full information suggestions.

HUGH H. GORDON,

3:18 P.M.

144

## EXHIBIT "Y."

*Pet'n's Ex. 6.*

WASHINGTON, D. C., May 26, '03.

Dear Romerises: Butler &amp; Vale want all the copies of the original contract made by the Indians with Maish &amp; Gordon. I wrote Gwydir to send one of the contracts; but B. &amp; V. say they will need all the contracts, that is the contracts with all the tribes. Express them immediately to Butler &amp; Vale, Bond Building, Washington, D. C.

Did you get my letter asking you to mail me at once the receipt for the \$150 which you forgot to hand me while you were here? I go south tonight. Please mail the receipt to me at Biscayne Fla.

Yours, &amp;c.

HUGH H. GORDON,

Biscayne, Fla.

145 *Contract Between the Several Tribes of Indians Resident Upon the Caledile Indian Reservation and Lee, Maish, of Pennsylvania, and Hugh H. Gordon, of Georgia.*

This agreement made and entered into by and between the San Paul Indians through and by \_\_\_\_\_ their agent, Attorney and Representative duly authorized and empowered by letters of Attorney \_\_\_\_\_ attached and made part hereof the Columbia Indians or Moses' Band, through and by \_\_\_\_\_ Moses, their Agent, Attorney and Representative duly authorized and empowered by letters of Attorney \_\_\_\_\_ herein attached and made part hereof, the Not Pomes Indians or Joseph's Band, through and by Joseph, their Agent, Attorney and Representative duly authorized and empowered by letters of Attorney \_\_\_\_\_ herein attached and made part hereof the Cherokees Indians through and by Martin Tuckshot, their Agent, Attorney and Representative duly authorized and empowered by letters of

attorney hereto attached and made part hereof the Colville Indians, through and by Barnaby their Agent Attorney and Representative duly authorized and empowered by letters of attorney hereto attached and made part hereof and the Lake Indians, through and by Bernard, the Agent Attorney and Representative duly authorized [46] and empowered by letters of attorney hereto attached and made part hereof parties of the first part, and Levi Maish of Pennsylvania and Hugh H. Gordon of Georgia, Attorneys at Law, parties of the second part witnesseth that:

Whereas on the 9th day of May, 1891, an agreement was made and entered into by and between the United States Government, through its duly authorized Commissioners, on the one part, and the Indians resident upon the said Colville Reservation, through their Chiefs and a majority of the male Indians above the age of eighteen (18) years on the other part; by which agreement the Northern portion of said Reservation was, upon certain terms and conditions, ceded, surrendered and relinquished to the United States;

And whereas the principal consideration to said Indians for the cession and surrender of said portion of their Reservation, was the express agreement upon the part of the United States Government to pay to said Indians "The sum of One Million, Five Hundred Thousand Dollars (\$1,500,000.) in five annual instalments of Three Hundred Thousand Dollars (\$300,000.) each, with interest thereon at five per centum (5%)".

And whereas the United States Government has failed to comply with the terms of said agreement and no provision has been made to pay the Indians the amount stipulated in the said agreement for the cession of said lands:

And whereas the said Indians entered into said agreement with an implicit trust in the good faith of the United States Government,

and now most earnestly protest that their lands should not [47] be taken from them without the payment of the just compensation stipulated in said agreement.

And whereas the said Indians resident upon said Reservation, are desirous of having their interests in said claim properly represented by counsel:

Now therefore, in consideration of the foregoing, and in further consideration of the mutual covenants hereinafter specified the said Indians, through their duly authorized Agents, Attorneys and Representatives, parties of the first part, and Levi Maish of Pennsylvania and Hugh H. Gordon Attorneys at Law, parties of the second part, do hereby covenant and agree as follows:

First. The purpose of this agreement is to secure the presentation and prosecution of the claims of said Indians for payment for their interests in said ceded lands, and to secure the services of said Maish and Gordon as Counsel and Attorneys for the prosecution and collection of said claims.

Second. The said Indians hereby employ and engage the said Maish and Gordon as their Counsel and Attorneys for the prosecution and collection of said claims against the United States Government, and the said Maish and Gordon hereby agree to act as Attor-

neys and Counsel for said Indians, and covenant that they will faithfully and diligently present and urge the claims of said Indians before the Courts, the Departments of the Government, the Congress of the United States, or before any other tribunal which may take cognizance of said claims, and will do all in their power to see that justice is done to said Indians.

Third. In consideration of the foregoing covenants, and in consideration of the services to be rendered by said Maish and Gordon, the said Indians hereby agree to pay to said Maish and Gordon a sum equal to fifteen per centum (15%) of any money or sums of money which may be collected for said Indians under the provisions of this contract; and the said Indians hereby agree that the said Maish and Gordon shall be paid as compensation for their services the sum of fifteen per centum (15%) of any appropriation which may be made for the payment of said claims.

Fourth. In consideration of the compensation herein specified, the said Maish and Gordon are to take sole and absolute charge, direction and control of the prosecution of said claims, and they are to pay all expenses which may be incurred by them in the prosecution of said claims; but they are not to be liable for any expenses incurred by said Indians or by anyone claiming to represent them, unless such expenses have been incurred under or in pursuance of the written direction or consent of said Maish and Gordon; nor shall any additional counsel be employed in this case without the written consent of said Maish and Gordon.

Fifth. It is hereby expressly agreed that the fee of fifteen per centum (15%) hereinbefore stipulated as the compensation of said Maish and Gordon for their services, is to be paid to them in a separate and special warrant out of any appropriation which may be made for the payment of said claims or any part thereof; and the balance of said appropriation or appropriations is to be distributed *per capita* to the Indians who may be entitled thereto, or expended for their benefit in such manner as Congress may direct.

149 It is distinctly understood and agreed that the payment of said fee to said Maish and Gordon is not to be delayed until the distribution of said appropriation or appropriations to the Indians who may be entitled thereto; but the Disbursing Officers of the United States Government are hereby authorized to issue said separate and special warrant, and pay to said Maish and Gordon the said fee of fifteen per centum (15%) as soon as any appropriation or appropriations for the payment of said claims are available.

It is further agreed that said Maish and Gordon are to be in no way responsible for, or connected with the distribution of the balance of any funds which may be due and payable to said Indians; it being distinctly understood that the duties and obligations of said Maish and Gordon under this contract will be fully met and discharged, and their said compensation will be due and payable when and as soon as said appropriation or appropriations for the payment of said claims have been made.

Sixth. This contract is to continue in force for and during the

term of ten (10) years from the date of its final execution and approval by the Commissioner of Indian Affairs and the Secretary of the Interior.

In witness whereof the said Indians, parties of the first part, through and by their said Agents, Attorneys, and Representatives, have hereunto affixed their hands and seals at Colville Agency Miles P. O., in the State of Washington, on this 12th day of May A. D. in 1894. And Levi Maish and Hugh H. Gordon, parties of the second part, have hereunto affixed their hands and seals at Washington, D. C. this — day of —, A. D. 1893.

150 THE COLUMBIA INDIANS OR MOSES BAND,  
By MOSES X (His mark), [SEAL.]

*Representative, Attorney and Agent.*

THE NEZ PERCE INDIANS OR JOSEPH'S BAND,  
By JOSEPH X (His mark), [SEAL.]

*Representative, Attorney and Agent.*

THE OKANOGAN INDIANS,

By MARTIN TONASKET X (His mark), [SEAL.]  
*Representative, Attorney and Agent.*

THE COLVILLE INDIANS,

By BARNABY X (His mark), [SEAL.]  
*Representative, Attorney and Agent.*

THE LAKE INDIANS,

By BERNARD X (His mark), [SEAL.]  
*Representative, Attorney and Agent.*

LEVI MAISH.

HUGH H. GORDON.

*Certificate of the U. S. Indian Interpreter.*

I, Robert Flett U. S. Indian Interpreter for the Colville 151 Indian Agency do hereby certify on honor that I was present when the foregoing contract was executed by the above named Indians, acting as the duly authorized Agents, Attorneys, and Representatives of the respective tribes or bands of Indians named in said contract, and that the said contract was carefully read and by me correctly interpreted, and the contents fully explained to, and understood by said Indians, and the identity of said contract with the contract embodied in the letters of Attorney thereto attached, fully and clearly made known to said Indians before the signing and execution of the same.

ROBERT FLETT,  
*U. S. Indian Interpreter.*

*Certificate of U. S. Indian Agent.*

I, John W. Bubb, Capt. U. S. A., Acting U. S. Indian Agent for the Colville Agency, upon the Colville Indian Reservation, do hereby certify that the above named Indians, to wit:

Moses.

Joseph.

Martin Tonasket.

Barnaby.

Bernard.

came into my presence on the 12th day of May A. D. 1894, and after the said contract had been read and interpreted to them the Indians above named acknowledged to me that they had executed the said contract in the name and behalf of the 152 respective tribes represented by them and in accordance with and under the authority granted in the respective letters of Attorney thereto attached. I further certify that to the best of my knowledge and belief, the above contract represents the wishes of the tribes or bands of Indians therein named.

JNO. W. BUBB,

*Capt. U. S. A., Acting U. S. Indian Agent for the  
Colville Agency Upon the Colville Reservation.*

STATE OF WASHINGTON, ss:

I, Jesse Arthur Judge of the Judicial District for Spokane & Stevens Counties of the State of Washington, said Court being a Court of record, do hereby certify that the foregoing contract was executed in my presence at Colville Agency, Miles P. O., in the State of Washington, on this 12th day of May A. D. 1894 and the interested parties therein as stated to me at the time and place of execution, were the Okanogan Indians, the Colville Indians, the Columbia Indians, or Moses Band, the Nez Perces Indians or Joseph's Band, and the Lake Indians, residing upon the 153 Colville Reservation in State of Washington, parties of the first part, and Levi Maish of Pennsylvania and Hugh H. Gordon of Georgia, Attorneys at Law, parties of the second part.

I further certify that this contract was made and executed in my presence by the duly authorized Agents and Attorneys of the parties of the first part as follows:

*Agent and Attorney for the San Puell Indians.*

MARTIN TONASKET.

*Agent and Attorney for the Okanogan Indians.*

BARNABY,

*Agent and Attorney for the Colville Indians.*

MOSES,

*Agent and Attorney for the*

*Columbia Indians or Moses Band.*

JOSEPH,

*Agent and Attorney for the Nez*

*Perces Indians or Joseph's Band.*

BERNARD,

*Agent and Attorney for the Lake Indians.*

The source and extent of the authority claimed by each of the said Agents and Attorneys to execute said contract, as stated 154 to me at the time of execution, is found in certain letters of attorney, executed respectively by said Tribes of Indians; which letters of Attorney are attached to the contract aforesaid, and made part thereof.

I further certify that prior to its execution the said contract was carefully interpreted, and its contents and import fully explained, and its identity with the contract in the said letters of Attorney clearly made known and demonstrated to said Agents and Attorneys of said parties of the first part.

It was also stated to me at the time that the said Maish and Gordon, parties of the second part, would execute said contract before a Probate Judge in the City of Washington, District of Columbia.

In witness whereof I have hereunto set my hand and seal this 12th day of May A. D., 1894 at Colville Agency in the State of Washington, at the time and place of the execution of the foregoing contract.

[SEAL.]

JESSE ARTHUR,  
*Judge of Spokane & Sturms Co. Judicial District,  
 State of Washington.*

DISTRICT OF COLUMBIA,  
*City of Washington, ss:*

I, Walker S. Cox, Associate Justice of the Supreme Court of the District of Columbia, the same being a court of record, do hereby certify that the foregoing contract was executed in my presence at Chamber 1, in the city of Washington, District of

155 Columbia; on this 5th day of July A. D. 1894 by Levi Maish of Pennsylvania and Hugh H. Gordon of Georgia, Attorneys at Law, and that it was stated to me at the time of the signing of said contract that the persons or parties interested in said contract are: the Columbia Indians or Moses Band, the Nez Perces Indians or Joseph's Band, the Okanogan Indians, the Colville Indians, and the Lake Indians, parties of the First part, by the respective Agents and Attorneys, named in said contract, and the said Levi Maish and Hugh H. Gordon, Attorneys at Law, parties of the second part; and that I have no interest, present or prospective, in the rights, claims or other matters mentioned therein.

In testimony whereof I have hereunto set my hand and caused the seal of the Court to be affixed this 5th day of July, A. D. 1894.

WALTER S. COX,  
*Asso. Justice of the Supreme Court  
 of the District of Columbia.*

DEPARTMENT OF THE INTERIOR,  
 OFFICE OF INDIAN AFFAIRS,  
 WASHINGTON, July 17, 1894.

The within contract is approved on condition that the Attorneys shall accept as full compensation for the services to be rendered

thereunder, the sum of ten percentum (10) of the amount or amounts they shall recover to the Indians thereunder.

156

D. M. BROWNING,

*Commissioner.*

C. H.

DEPARTMENT OF THE INTERIOR,

July 25, 1894.

M. C. P.

The within contract is approved on condition that the Attorneys shall accept as full compensation for the services to be rendered thereunder, the sum of ten (10) per centum of the amount or amounts they shall recover to the Indians thereunder, without endorsing or admitting, however, the recitals of this instrument to the effect that the United States made or violated any contract with said Indians. It being the view of this Department that the incipient contract proposed by the Commission was never perfected and needed the ratification of Congress to make it an obligation of the United States.

WM. B. JONES,

*Acting Secretary.*

JANUARY 20, 1899.

The foregoing contract is accepted as approved.

LEVI MAISH.

HUGH H. GORDON.

157

*Order Permitting Deposit in Lieu of Bond.*

Filed May 7, 1909.

In the Supreme Court of the District of Columbia.

Equity No. 28005. Consolidated.

RICHARD D. GWYDIR et al., Complainants,  
vs.

HUGH H. GORDON et al., Defendants.

It is by the Court this 7th day of May, 1909, ordered that the decree heretofore entered in this cause dismissing the cross bill of intervenors and cross complainants Butler & Vale, be, and the same hereby is amended as of date April 16, 1909, so that leave be, and the same hereby is granted to the said intervenors, and cross complainants to deposit the sum of \$100 for costs on appeal in lieu of a bond.

JOB BARNARD,

*Justice.*

*Testimony on Behalf of Defendant.*

Filed May 27, 1909.

In the Supreme Court of the District of Columbia.

In Equity. No. 28005.

FREDERICK C. ROBERTSON et al.

vs.

HUGH H. GORDON et al.

WASHINGTON, D. C., May 22, 1909—10 o'clock a. m.

Met pursuant to adjournment at the office of John Lewis Smith, Esq., 458 Louisiana Avenue, Washington, D. C.

Present on behalf of the complainants, Mr. Patrick.

Present on behalf of the defendants, Mr. Archer.

Whereupon HUGH H. GORDON, a witness of lawful age, called by — on behalf of the defendants having been first duly sworn, testified as follows:

By Mr. ARCHER:

Q. Major, what is your residence? A. Biscayne, Florida.

Q. What is your business or profession? A. By profession I am a lawyer, but at present am engaged in fruit growing in Florida.

Q. Are you the same Hugh H. Gordon that is mentioned 159 as defendant in this case? A. I am.

Q. Do you know the complainant, Mr. Frederick C. Robertson? A. I do.

Q. When did you first meet Mr. Robertson? A. In March, 1906, in Washington, D. C.

Q. At what time in March? A. I think about the 27th or 28th of March.

Q. With reference to the date of the contract in suit in this case, when did you first meet Mr. Robertson? A. The contract as I recollect was executed on March 28th, 1906, and I think it was executed on the same day or the day following the first time I ever met Mr. Robertson.

Q. Did you have any business relationship with Mr. Robertson prior to that time? A. I had an agreement with Mr. Robertson by which he was to aid —

Mr. PATRICK: We object to that question on the ground that it intended to vary the contract or agreement, the subject matter of this litigation, which is not permissible; the contract itself having been introduced and admitted is the best evidence of the business relations between them.

(The question was repeated.)

A. Yes, I had an agreement with Mr. Robertson by which he was —

By Mr. ARCHER:

Q. How was that agreement made? A. Through correspondence.

160 Q. Between whom? A. Between R. D. Gwydir of Spokane, Washington, and myself, and Mr. Robertson and myself.

Q. Do I understand that the correspondence was between Mr. Gwydir and Mr. Robertson? A. No; between Mr. Gwydir and myself. Mr. Gwydir and Mr. Robertson were in Spokane together, as I understand, at that time.

Q. Have you any of that correspondence? A. I have three letters only.

Q. Where are they? A. I have them here. Two are from Mr. Robertson and one from Mr. Gwydir (handing letters to counsel). Copies of those from Mr. Robertson are already in evidence, I think.

Q. I find that you hand me only two letters, both of which appear to be from Mr. Robertson. A. I thought the one from Mr. Gwydir was also in the envelope handed you. I think I can find it and produce it if needed.

Q. Where were you when you wrote your letters to Mr. Gwydir and Mr. Robertson, which you have spoken of? A. I wrote letters to Mr. Gwydir from several points; one I think from Kirkwood and another from Reynolds, Georgia, and the remainder, I think, from Biscayne; and possibly one or two while I was in Washington at one time.

Q. How were they written in type or manuscript? A. They were written in manuscript.

Q. Tell us whether or not you kept copies of your letters? A. I did not. The majority, I think were written in the country 161 where I had no conveniences for making copies.

Q. You have read the deposition of Mr. Robertson and Mr. Gwydir and the exhibits attached? A. Yes.

Q. Do you know whether there were any other letters written by you than those which are in those depositions? A. Yes; there are several letters that I wrote that are missing. The one letter which was a reply to a letter from Mr. Gwydir, asking that Mr. Robertson be associated with him in the agreement with me to procure a new contract is missing—

MR. PATRICK: I object to that testimony on the ground that the evidence is secondary, that no effort is shown to have been made to obtain the originals. It is not shown that the letter was ever in the possession of the plaintiff Robertson, nor that he ever saw or knew of it, and it is not shown that Major Gwydir had any authority to communicate the letter to the plaintiff; and I move to strike out so much of the answer as comes within the scope of this objection.

By Mr. ARCHER:

Q. Are there any more letters to Mr. Gwydir that are not in the

record? A. I think so, but I cannot recall definitely which they were, unless I examine carefully all the correspondence again.

Q. How about any letters to Mr. Robertson? A. I think that the first letter that I wrote to Mr. Robertson after the receipt of the letter from Mr. Gwydir, to which I have referred, is not in evidence.

162 Q. Did you keep a copy of that? A. No.

Q. Are there any more letters to Mr. Robertson which you recall that are not in the record? A. I cannot recall whether there are other letters missing that I wrote to Mr. Robertson, or not.

Mr. ARCHER: As I understand it, gentlemen there was a call made upon Mr. Robertson, and Mr. Gwydir at Spokane by Mr. Thomas A. Scott, representing Major Gordon, for all letters and correspondence in reference to the subject matter of this suit, which call was formally made. Is there any dispute about that?

Mr. PATRICK: No that was done.

Mr. ARCHER: I will ask counsel for the complainant and the complainant himself, who is present, whether there are any letters in their possession in reference to the subject matter of this suit than those which have been offered in evidence as a part of the complainant's case.

Mr. PATRICK: That has nothing to do with this inquiry, whatever was done in Spokane.

Mr. ARCHER: I am simply asking the question whether you have those letters.

Mr. ARCHER: I offer in evidence a letter dated May 9th, 1904, purporting to be signed by Mr. F. C. Robertson and to which I understand there is no objection as to the genuineness of the letter. I offer it without those pencil under-scores, which will be erased.

Mr. PATRICK: The plaintiff objects to the introduction of this letter and to any letters, correspondence or conversation occurring prior to March 28th, 1903, the date of the agreement incorporated in the bill of complaint, that tends to prove a new contract, or to vary the terms of the plain written instrument, or would change and alter the scope and meaning; the agreement pleaded by the complainant being admitted by the defendant; its terms control the construction as a matter of law; and the same being plain and unambiguous the testimony offered does not tend to explain or to contradict it hence it is not receivable; and the agreement being in writing the construction is for the Court, according to the terms thereof. If the testimony proposed to be offered does not tend to vary or contradict the agreement, it is illegal, irrelevant and immaterial in this suit, and merely encumbers the record. The plaintiff makes this objection to apply to all testimony of this character.

Mr. ARCHER: I was going to suggest for the sake of economy, that we have this objection apply to all examination with which it is in conflict.

Mr. PATRICK: Yes. Do you suggest that may be considered by the Court as of the same force and effect as if specifically addressed to each question?

Mr. ARCHER: Yes,

Said letter of May 9, 1904, marked Defendant's Exhibit No. 1, is filed herewith, and is in the words and figures following to wit:

Robertson, Miller & Rosenhaupt,  
Lawyers.

SPOKANE, WASHINGTON, May 9, 1904.

Hugh H. Gordon, Esq., Miami, Fla.

DEAR SIR: Major Gwydir, an old and warm personal friend of mine, has placed before me certain correspondence and documents transmitted to him by you and under your direction. I may say that I was Assistant U. S. Attorney under Cleveland, and am reasonably familiar with the Indians on the Colville Reservation and conditions there, and Major Gwydir has asked me to assist him in the matter. He is well thought of by the Indians, and a thoroughly capable man to carry out what he undertakes. I, however, desire you to understand that whatever I do in the premises is with the assistance and under the agreement with Major Gwydir and yourself, and therefore you can write me fully and confidentially as we will both take up the letter at this end. Major Anderson, the Indian Agent on the Colville Reservation was lately removed, and there is no agent now on the Reservation. It might, therefore, be important that you should be informed of this fact, as, if the contract was accepted, it would probably be at once referred to Washington before it was approved by the special agent here, who I assume has no authority. You will remember that in 1892 the north half of the Colville Reservation was thrown open to allotment, and in 1896 it was generally thrown open to be entered under the general land laws of the United States; and I am not prepared to know exactly what is the status of the Indian Claims. It having been previously my understanding that when the Reservation was thrown open in 1892 and 1893, without any Congressional Act giving the Indians anything so far as I know, that this settled their rights, and was a repudiation of any treaty right on the ground that the land originally placed in this reservation by executive order did not belong to any tribe of Indians and therefore no treaty was necessary, either to create the Reservation or to authorize its return to the public domain free from any claim on the part of the Indians. Of course I do not want to discredit anything since this claim seems to be well founded but I desire to get your understanding of the law applicable to it with a view of getting as advantageous a contract as possible, and also, if possible, in determining the value of this claim and in explaining what has been done, and what remains to be done. I presume you are thoroughly familiar with all the facts, and can give me information with reference to all legislative action had, and whether or not this is considered an action that can be established in a Court of Claims without Congressional action, and what else you deem to be of importance here, and whether or not Major Gwydir and myself, you also to be mentioned if you desire, should

not be authorized in the first instance by the Indian Department to secure the contract, subject to the approval of the Indian Department. Had we a friend on the Reservation, as Major Anderson was, we could take this matter up directly here, but this agent would probably report any attempt to take the contract now direct to Washington, under the circumstances of the case. Even if any person were sent here, I feel confident with the acquaintance Major Gwydir has and the acquaintance that I have with the Indians, that I can fairly assure you that no contract could be obtained here without fully protecting your interests in the premises. I will have the proper contracts made, and should endeavor to have the Major prepared to go to the reservation at any time; and should you desire to wire us, you may do so. You can understand that a contract

of this kind requires considerable labor and time, in getting  
166 the Indians together, hence we should like to understand

the conditions so as to answer the questions of the Indians that they would be apt to ask. I can probably obtain the information asked by personal investigation from the statutes, but as to the conditions and status of this litigation I would have to obtain it from yourself and associates.

Major Gwydir will write to you today, explaining to you fully.

Very respectfully,

F. C. ROBERTSON.

Dict. F. C. R.

MR. ARCHER: Now for the sake of identification, although I think there is a copy of this letter in evidence in the depositions of the complainants, I offer the letter of October 3rd, 1906, from Mr. Robertson to Major Gwydir, subject to the same objection, and ask that it be marked defendant's Exhibit No. 2, and copied into the record.

Said letter, marked Defendant's Exhibit No. 2, is filed herewith, and is in the words and figures following, to wit:

"Robertson, Miller & Rosenhaupt,  
Lawyers.

SPOKANE, WASHINGTON, Oct. 3, 1906.

Hon. Hugh Gordon, Biscayne, Florida.

MY DEAR MR. GORDON: I transmit to you herewith the testimony recently taken here, which I desire you to have. It may 167 guide you in your testimony. I understand that seeing any members of Congress not on the Committee by personal solicitation is held in the case of Childs vs. Trist, Supreme Court of the United States to be lobbying services for which a recovery cannot be had. In view of the fact that when Mr. Maish died the contract was abrogated unless renewed, and in view of the further fact that many of the services appear to have been done under the Nuzum-Gordon contract, and we are able to show association with them in this work, I beg to call your special attention to the force of the claim predicated upon these lines. I understand that our con-

tract was fully executed by Butler & Vale, and therefore I cannot see how we would be benefitted by doing anything except aiding them in this matter, as they must protect us under the written agreement. I did not mention Major Gwydir for I was sorry to learn that there has been filed by Mr. May letters passing between Major Gwydir and Maish, which show conclusively that Gwydir was in the service of the Government when this contract was procured, and that he proposed to take certain steps in getting the assistance of the Agent that would defeat every right under this contract. These facts I did not know, and only learned several days ago. There was absolutely no need of putting in any evidence as to how your contract was originally obtained, for it was approved by the Secretary of the Interior, Mr. Smith, and in the absence of impeaching testimony offered by us, it would sustain the contract for whatever it was worth. You can take whatever course you desire in the premises, but as for myself, I could not indicate anything that would tend to show that I had knowledge of this condition, which I never did, and which I  
168 doubt if you did. I suggest that owing to the great expense of going to Washington and protecting our interest, and owing to the positive admission of Mr. Vale that we are protected by the contract with them, we had best leave this matter entirely in their hands, and be largely governed by their advice in the premises. You can understand that no services looking to the renewal of our contract could be recovered, and therefore I mention nothing about that phase of the case. Everybody here seems to think that we have made a conclusive case, and as you are equally protected with us, it seems that you must believe that also. Trusting that you may be in good health, and requesting you to return this evidence to me as soon as you have read it as I have borrowed it, and am sending it to you as I desire you to be fully informed in the premises.

Yours very respectfully,

F. C. ROBERTSON.

Diet. F. C. R.

MR. PATRICK: The plaintiff moves to strike this and all similar answers to similar inquiries out on the ground that the testimony is illegal, irrelevant and immaterial.

MR. ARCHER: That motion will be understood to apply to the whole testimony.

MR. PATRICK: That it seeks to control by parol a written and admitted instrument, and that this objection shall be understood to apply without repetition to all similar questions and similar answers.

By MR. ARCHER:

Q. When will you be able to produce the third letter about  
169 which you spoke? A. I will look for it immediately upon my return to my room today.

Q. Have you in your possession the original of any other letters from either Mr. Robertson or Major Gwydir? A. No; those are the only ones that I have been able to find.

Q. Tell us, if you know, what became of any other letters. A. A letter case of mine in which were a number of letters from Mr.

Gwydir, and I think from Mr. Robertson, was destroyed during my absence in Florida, and a number of other papers with it.

Q. Do you know they were destroyed? A. A colony of white ants which prevail in that section got into it and made tatters of all the letters, and partially destroyed the box itself.

Q. Understanding that the Maish-Gordon contract is in evidence; for convenience in referring to it, I will ask you when by its terms the Maish-Gordon contract expired? A. I think, July 25th, 1904.

Mr. PATRICK: Is the record in the Court of Claims understood to be in evidence?

Mr. ARCHER: I think so. I presumed that it was.

Mr. PATRICK: Suppose it is understood now that it will be considered in evidence. It is too big to file. Suppose that it shall be considered as evidence, and both parties are at liberty to refer to it during the hearing of the case.

Mr. ARCHER: Meaning the record of the Court of Claims in the case of Butler & Vale against the United States and Colville Indians.

170 Mr. ARCHER: We assume that the Maish and Gordon contract according to its terms, expired about the 25th or the 26th of July, 1904, and that is understood, subject to be corrected by the record itself.

By Mr. ARCHER:

Q. What, if any, employment of or relations with Mr. Robertson, had you with reference to the Maish-Gordon contract? A. None whatever.

Q. I ask you to state what, if anything, was contained in any of the letters which are not here, as stated, or which were lost or destroyed as stated; anything that was said with reference to any services to be rendered by Mr. Robertson under the Maish-Gordon contract?

Mr. PATRICK: I object to this question in addition that it is attempting to establish by secondary evidence facts that would be illegal and incompetent testimony under any circumstances. The witness is not asked to state the contents of those missing letters, but his understanding of them—a conclusion, not a fact. We further object to any supposed missing letters to or from Gwydir on the ground that it has not been shown that Robertson knew anything about them or was or could be affected by them.

A. None whatever.

By Mr. ARCHER:

Q. When did the correspondence between you and Mr. Robertson begin? A. I think the first letter I had from Mr. Robertson was the letter of May 9th, 1904, which was written in response to my letter to Mr. Gwydir, assenting to the proposed arrangement  
171 for Mr. Robertson to co-operate with Gwydir in procuring a new contract with the Colville Indians.

MR. PATRICK: I move to strike out the answer for the reasons already alleged, and that it is a voluntary conclusion of the witness as to the contents and effect of the latter.

By MR. ARCHER:

Q. Are you able to give the contents or the substance of the contents of any of the letters that are not in evidence for the reasons given for the absence, subject to objection as to the secondary character of the testimony, meaning letters to or from Mr. Robertson?

A. I cannot recall the substance of missing letters written by me to Mr. Robertson without more careful examination of correspondence and getting the sequence.

Q. Referring to paragraph 5 of the bill of complaint in this case of Robertson against Gordon and others, alleging in substance that said Gordon and Maish and said defendant Gordon entered into arrangements and agreements with the plaintiff to assist in prosecuting and securing the collection and payment of the said claims of the said Colville Indians, I will ask you whether or not any such arrangements and agreements were entered into? A. No such agreement was entered into by Maish and Gordon jointly, because Maish had died five years before I ever heard of the plaintiff, and no arrangement was made by me, except an arrangement by which Mr. Robertson was to co-operate with Gwydir in securing a new contract with the Colville Indians.

Q. What was your situation in respect to the Indian claim  
172 at that time that negotiations or relations with Mr. Robertson  
were opened?

MR. PATRICK: I object on the ground that that is a legal conclusion; the witness is only to state facts.

A. The Maish and Gordon contract lacked only about a year of expiration at the time this correspondence with Gwydir and Robertson began, and I had practically lost hope of accomplishing anything under the Maish and Gordon contract, and opened negotiations for the purpose of securing a new contract with the Indians.

By MR. ARCHER:

Q. Are the negotiations you referred to those mentioned in the letters attached to the complainants' deposition? A. Yes sir.

Q. Referring to paragraph 5 of the bill of complaint again, where it is stated in substance that Gordon agreed to and did admit plaintiff to an equal co-partnership and share with him therein, meaning the claims of the Colville Indians I will ask you whether or not aside from the legal effect of the agreement of March 28th, 1906, Mr. Robertson was admitted to a partnership interest with you in said Indian Claims? A. No interest whatever under the Maish and Gordon contract was ever accorded to Mr. Robertson except upon condition that the new contract contemplated was secured.

Q. I ask the question again with special reference to the claim of the Colville Indians, whether under the Maish and Gordon contract or not.

Mr. ARCHER: I will state that the witness in his answer limited himself to the Maish and Gordon contract. I am asking  
173 with reference to the claim generally.

(The question was repeated.)

A. I never made any arrangement or authorized any arrangement to be made with Mr. Robertson contemplating giving him any interest in the Indian Claim, except under the condition that he was to secure the new contract.

Mr. PATRICK: I move to strike out the answer on the ground that it is not a statement of fact, but the conclusion of the witness, and argument instead of testimony.

By Mr. ARCHER:

Q. What do you mean by the reference to a proposed new contract? A. In one of the letters which are missing Mr. Gwydir wrote me in reply to a letter written to him, suggesting that he undertake—

Mr. PATRICK: I object on the ground that the contents of a letter between the witness and Mr. Gwydir are incompetent if produced directly, and incompetent now as secondary evidence.

(The question was repeated.)

A. To secure a new contract with the Colville Indians.

Q. For what? A. For the prosecution of their claims against the United States Government for the payment of lands ceded by the Indians to the Government.

(The witness asked that his previous answer be changed so as to put the words "Mr. Gwydir wrote me" at the end of the answer last given.)

Mr. PATRICK: I object to any change whatever in the testimony after it is given, although I am willing that subsequently any explanation desired shall be made to correct it.  
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Mr. ARCHER: I ask the witness to explain what he means. I confess I do not understand what the charge is, or what the correction is.

The WITNESS: It is not a change of the substance, but to simply put "Mr. Gwydir wrote me" after the parenthetical clause.

(The question was repeated.)

A. (Continuing:) And suggested that Mr. Robertson be associated with him in the effort to secure this new contract and to that I assented. Subsequently thereto Mr. Robertson wrote me the letter dated the 9th, which contains his assent.

By Mr. ARCHER:

Q. What letter of May 9th—what year? A. 1904.

Q. After the expiration of the Maish and Gordon contract, or the time of its expiration by its terms, what, if any, situation arose which made it important to get a new contract? A. I believed that all chance of securing—

Mr. PATRICK: I object to any belief, insisting that the witness is only permitted to state facts.

A. (Continuing:) I believed at the time that the only way to secure an appropriation for the Indians after the expiration of the Maish and Gordon contract would be to secure a new contract.

By Mr. ARCHER:

Q. Have you any knowledge of any other contract having been obtained from the Indians after the expiration of the Maish  
175 and Gordon contract?

Mr. PATRICK: I object on the ground that any other contract is immaterial, and further that the contract itself is the best evidence, if in existence.

A. There is in the record an alleged contract claimed to have been obtained from the Indians by a man named McDonald. The record in the Court of Claims—

By Mr. ARCHER:

Q. What if anything was being done by the Colville Indians, if you know, in the prosecution of their claim, after the expiration of the Maish and Gordon contract? A. I do not know of anything that was being done by the Indians. The attorneys here in Washington whom I had employed to aid me in the prosecution of the claim of the Colville Indians under the Maish and Gordon contract had completed their case and presented all the law and the facts necessary to make out the case.

Mr. PATRICK: I move to strike out the answer on the ground that it is argumentative, that whatever was done was done in the absence of this witness; that it is not testimony but under the guise of testimony an argument of the question of fact.

By Mr. ARCHER:

Q. What was in your mind during the negotiations with Mr. Robertson as to the effect of the McDonald contract upon your rights?

Mr. PATRICK: I object to that on the ground that the McDonald contract has nothing whatever to do with this litigation.

176 A. Mr. Robertson wrote me—

By Mr. ARCHER:

Q. Is that letter here? A. Yes; he wrote me telling me of this McDonald—

Q. You had better refer to the letter and not give its contents; if you can find it. A. I will state that my first information in regard to the McDonald contract having been secured came to me through this letter from Mr. Robertson of January 8th, 1903, and I realized that that contract, if approved, would prevent the securing of the contemplated new contract by Mr. Robertson and Mr. Gwydir.

Q. With what effect upon yourself? A. I then believed that it

meant the total loss of all the chance to secure any compensation through any new contract.

Q. State whether or not the new contract referred to was ever drafted? A. I don't understand that. Which new contract?

Q. The new contract which you say Gwydir and Robertson were to get. A. I sent to them a copy of the Maish and Gordon contract to be used as a model for securing the new contract, with the suggestion that they substitute in the place of the names of Maish and Gordon the name of R. D. Gwydir and associates.

Q. How was that suggestion made? A. By letter.

177 Q. Is the letter in evidence? A. Yes sir.

Q. Give me the date of it. A. (after examination:) The letter of mine to Gwydir dated April 16th contains the suggestions as to the way in which the new contract should be taken.

By Mr. PATRICK:

Q. What year? A. April 16th, 1904.

By Mr. ARCHER:

Q. Prior to the agreement of March 28th, 1906, what, if any, definite arrangement had been made as to the compensation of Mr. Robertson? A. Nothing definite had been determined between us. I had made some suggestions as to the interests which he and Gwydir were to receive in case the new contract was secured, but no definite terms were ever agreed upon until the supplemental agreement of March 28th, 1906, was entered into in Washington, D. C., between Mr. Robertson and myself.

Mr. PATRICK: I object to the answer and move to strike out because no original agreement has been introduced in evidence or established, to which the agreement of March 28th, 1906, might be referred to as supplemental. It is also stated by the witness that everything relating to the compensation was in writing; that those writings are in evidence, and he states that nothing definite had been concluded prior to March 28th; therefore his reference to that document as supplemental is contradictory of his own testimony.

By Mr. ARCHER:

178 Q. What, if any, verbal agreement was made with reference to Mr. Robertson, in reference to his compensation, prior to March 28th, 1906?

Mr. PATRICK: The same objection.

A. I made no verbal arrangement with Mr. Robertson of any character.

By Mr. ARCHER:

Q. What, if any, services were rendered in the prosecution of the claim of the Colville Indians after the date of March 28th, 1906?

Mr. PATRICK: I object to the witness stating anything except what he did himself, or what was done of his own knowledge.

A. I cannot testify as to that.

By Mr. ARCHER:

Q. What was the situation of the claim of the Colville Indians at that time? A. The case on the part of the Attorneys, so far as my knowledge went, had been made out complete, and we were simply awaiting the action of Congress.

Q. Where was the case depending? A. In Congress.

Q. Had any appropriations been made *at* that time? A. No.

Q. What were the plans of action in the prosecution of the claim at that time—the things to be done in its prosecution? A. One plan was to wait action by Congress, and some suggestion had been made as to a reference to the Court of Claims.

179 Q. How if at all had the claim of the Indians been presented to Congress? A. It had been presented by attorneys employed by me; by briefs filed with Committees; by arguments before Committees.

Q. What Committees? A. The Committee on Indian Affairs in the House and the Senate.

Q. What was the consideration of the contract of March 28th, 1906, with Mr. Robertson, which is set out in the bill?

MR. PATRICK: The same objection is repeated, and the full consideration is stated on the face of the contract. The contract governs and cannot be varied or contradicted by parol.

A. My understanding was that Mr. Robertson and Mr. Gwydir were to secure a new contract as a condition precedent for Mr. Robertson's share or any interest whatever in the expected fee.

MR. PATRICK: I move to strike out that on the ground that it does not appear that Major Gwydir was a party to this contract, and further, that the claim of the witness is in contradiction of the terms of the contract.

By Mr. ARCHER:

Q. State whether or not the new contract was obtained? A. It was not.

Q. What, if any, service was Mr. Robertson to render you or the Indians in the matter? A. I never employed Mr. Robertson, nor authorized his employment in the case for any other purpose than to secure the proposed new contract; and he did not render any service, and at that time could not have rendered any other 180 service than by procuring a new contract.

Q. Why? A. Because there was nothing that could be done in the West under the *old* contract, and the case under the old contract in Washington was absolutely closed.

Q. Why was it that the stipulation you referred to about obtaining a new contract was not incorporated in this agreement of March 28th, 1906?

MR. PATRICK: I object to that on the ground that, as before stated, it seeks to contradict and vary the contract is estopped from setting up as against his partner therein anything that by his own act or commission was left out of the contract.

A. The typewritten draft of that agreement of March 28th, 1906, was prepared by Mr. Robertson, and as the sole basis upon which I had any business relation with him was his prior agreement to aid Gwydir in securing a new contract, I did not deem it necessary to insist upon its repetition in this supplementary agreement.

Mr. PATRICK: I move to strike that out on the ground that the secret processes of the witness' mind and argument in the premises, is not admissible to alter, vary or control the terms of this written instrument. Further, it is a mere opinion of the witness.

By Mr. ARCHER:

Q. Referring to the last clause of the contract of March 28th, 1906, as follows: "Fees to be divided between said Robertson and said Gordon, as herein provided, shall be the net sum accruing 181 to the said Gordon after settling with other attorneys under contracts heretofore made by said Gordon. What other attorneys does that refer to? A. It refers to attorneys who had been previously employed by me under the Maish and Gordon contract, and it was inserted by me in a pen written addition, because it occurred to me that if the appropriation should be afterwards made, subsequent to the procuring of the new contract by Robertson and Gwydir and payment of the fee thereunder should be accredited to services under the Maish and Gordon contract, that I would still, as stated in that agreement, be willing to share the fee received from any source with Mr. Robertson; but if the fee were accredited to services under the Maish and Gordon contract, it would necessitate compensating the attorneys employed under that contract, before dividing with Mr. Robertson.

Mr. PATRICK: I move to strike that out on the ground that it is argumentative and tends to vary the terms of a written contract; and that it details the secret mental processes of this witness' mind at the time when there was a written instrument, fully complete in its terms.

By Mr. ARCHER:

Q. Some reference is made on the complainant's deposition to an agreement among the attorneys at the time the case was pending in Congress. Was that in writing, or a verbal contract? A. I presume preference is made to what was called the Raleigh agreement, which was a species of compromise arrangement made with the express understanding that the concessions made therein by me 182 would secure the direct appropriation of the fee by Congress.

Mr. PATRICK: I object to that and move to strike out the answer unless it is shown that the understanding to that effect was made with Congress, no individuals having the right to bind the legislature.

By Mr. ARCHER:

Q. With whom was that understanding had? A. Mr. Butler represented to me—

Q. No; I do not want that. Whom was the understanding had with? Who were parties to that contract? A. I think Messrs. Butler & Vale, Mr. Robertson, Mr. Nuzum, and myself as I recall it.

Q. And where was the contract made? A. I think it was signed by Mr. Robertson, Mr. Nuzum and myself at the Raleigh Hotel.

Q. Have you a copy of it? A. No; it was lost with the other papers.

Q. In reference to what fee was it entered into? A. The fee which we expected to receive under a direct appropriation by Congress.

Q. State whether there ever was a direct appropriation by Congress? A. There was not of any fee.

Q. Was there any agreed amount or understanding as to the amount of the fee to be directly appropriated? A. I don't remember the phraseology of the agreement.

Q. I don't want that. I mean the understanding of the parties.

A. The understanding of the parties was that \$150,000  
183 was expected to be appropriated as a fee, the contract with the Indians having been ratified by the Commissioner of Indian Affairs for that fee, or for a fee of 10 per cent.

Q. Did you participate in the trial of the case in the Court of Claims? A. I did.

Q. Are you familiar with what was done in that case? A. I think so.

Q. I ask you to state whether this written contract of March 28th, 1903, was submitted to the consideration of the Court of Claims.  
A. It was.

Q. How? A. The Court called for its production, after its production had been refused by Butler.

Q. I mean the contract between yourself and Mr. Robertson?  
A. Oh; I beg your pardon. I thought you referred to the Raleigh agreement. I don't know whether Mr. Robertson submitted the written contract of March 28th to the Court of Claims. I saw no record of that contract.

Q. Understanding that the record of the case in the Court of Claims may be referred to I now refer to it in connection with the last question and answer. Major Gordon is there any other statement which you think of that I have not covered which you wish to speak about? A. I wish in justice to myself to explain the meaning of one letter in those which have been filed, which contains instructions to Mr. Gwydir to secure the co-operation of the Indian Agent and compensate him for any services he might  
184 render in aiding in securing the new contract.

Q. What is the date of that letter. A. (after examination): August 24th, 1903. I wish to say that in the effort to secure a new contract with these Indians, we were not attempting anything illegal, nor were we endeavoring to deceive, impose upon or wrong anyone in seeking a renewal—

Mr. PATRICK: I object to the witness reading from a prepared written statement.

By Mr. ARCHER:

Q. What is the paper you refer to, Major? A. I am just referred to this (indicating)—a memorandum here.

Q. Made by whom? A. By myself.

Q. When? A. Several days ago.

Q. You had better make your statement without reference to that. A. (continuing): In seeking a renewal we were not attempting to do anything illegal. We were really doing what we considered to be a service to the Indians, and as in the previous case, when we secured the contract, the Maish and Gordon contract, we had the entire approval and co-operation of all the authorities, we believed that we were entitled to the same co-operation and approval in this instance.

Mr. PATRICK: I move to strike out the answer on the ground that the letter itself is the best and only evidence of what it says and what it means.

185 By Mr. ARCHER:

Q. What, if anything, did the Indian Agent referred to have to do with the obtaining of a new contract? A. The Indian Agent had no official relation whatever to the execution of a new contract, and our only idea was that he should co-operate with us in doing what we believed would be a benefit to the Indians.

Q. What, if any, duty was he charged with in respect of the obtaining or execution of the new contract? A. He had no official duty in connection with it at all.

Q. Did he have any duty in respect of it? A. He had no duty; no.

Mr. PATRICK: I move to strike that out on the ground that it is a conclusion of law, his duties being fixed by positive enactment of the Statute.

By Mr. ARCHER:

Q. Do you know of any action that he was taking in reference to it? A. I do not.

Q. Were you ever advised of any action he was taking in reference to it? A. I don't recall about that.

Q. State whether or not the circumstance was in any way involved in the Court of Claims trial? A. This question as to the compensation of the agent was brought up in the Court of Claims, and the identical issue was discussed in our briefs.

Mr. PATRICK: We object to that on the ground that that 186 is not borne out by the record; that the Court of Claims record shows that the witness positively denied any authority to any such act as is set forth in the letter he now explains, and hence the identical matter was not passed upon by the Court of Claims at all.

A. I mean the question of the compensation of the agent and the matter was ignored by the Court of Claims.

MR. PATRICK: I move to strike out on the ground that the record of the Court of Claims is the best and only evidence of what occurred there.

Whereupon a recess was taken until 1.30 p. m.

After recess HUGH H. GORDON resumed the stand for further direct examination:

By MR. ARCHER:

Q. Did you get that letter? A. I could not find it; I thought I put it in this envelope, and I was surprised I could not find it.

MR. ARCHER: Gentlemen, I will state that the letter which Major Gordon was to produce after the adjournment, being a letter from Major Gwydir, could not, as he informs me, be found, and therefore I am unable to put it in the record.

Cross-examination.

By MR. PATRICK:

Q. In your letter of August 24th, 1903 to Major Gwydir you say in regard to the fee for the agent: "I think you had better 187 offer him anywhere from a thousand to \$2500, to be paid out of the proceeds of the fee when the claim is collected. Make the best terms you can, but if necessary to secure his active co-operation you can offer him \$2,000 or \$2,500. You will know how much we offered the former agent and can be guided in a measure by that, but I should think \$1500 or \$2500 ought to be enough. He will be on the ground and will have little or no expense, but don't fail to get him." The last six words are underscored. You have explained that in your direct examination. Please state if you did not know at that time that the Indian agent was paid by the United States for all services he was permitted to perform in connection with the Indians. A. I knew that he was paid for his services as an Indian agent.

Q. That does not quite answer my question. Did you not know that he was paid by the Government for everything that he was permitted to do for the Indians? A. No; I didn't know it, because in the case of the Maish and Gordon contract the Government permitted the former agent to co-operate with us, and the agent himself made a demand upon us for payment of a thousand dollars for the act of the official interpreter, which was to be a contingent fee.

Q. That was for the interpreter not for the agent, was it not? A. I understand: but the government authorized the agent to co-operate with us, my recollection is.

Q. How much did you offer the former agent? A. I don't remember authorizing Mr. Gwyder to offer any specific sum. I remember writing Gwyder that we would be willing to compensate him for his services.

Q. You say here in your letter to Major Gwydir "You will know how much money we offered the former agent and can be guided in

a measure by that. Did you not know when you wrote this letter how much the former agent was offered? A. No; I did not. I didn't recall at least, if I ever knew. When the testimony was taken before the Court of Claims and the evidence was introduced that Major Gwydir had offered the former agent \$5,000 for his services, it was a surprise to me, because I had no knowledge of any specific arrangement about any such sum being offered to him.

Q. You say here: "But don't fail to get him." To get him for what? A. To get his co-operation in securing this new contract as I have stated. We had been authorized by the Government, as I stated, to secure the co-operation of the former agent, and I considered it a perfectly legitimate transaction to secure the co-operation of the present agent, and there was nothing illicit contemplated.

Q. By paying him a sum of money? A. Certainly for his services.

Q. Do you not know that he was not entitled to it, and was prohibited by law from accepting any money from any person for any services performed by him as Indian Agent? A. In acting in an official capacity, I did.

Q. Did you not know at that time that it was contrary to law and against public policy to purchase the services of a public official of the Government to perform any duty in connection with his official relations to the Government? A. There was no effort  
189 to secure his services in connection with any official relations of the Government.

Mr. PATRICK: I move to strike out that answer and request an answer that shall be responsive to the question.

Mr. ARCHER: I object to the question upon the ground that the thing Major Gwydir, or both, did, is the subject of inquiry, and not the thing which Mr. Patrick describes in his question; to wit, the procuring of an agent to do something in his official capacity.

(The question was repeated.)

A. Certainly it would have been unlawful to have purchased an officer's act in connection with his official duties but no such thought was contemplated by us.

Mr. PATRICK: I move to strike out the "thought."

By Mr. PATRICK:

Q. Could any person have gone upon the Colville Reservation and secured a contract with the Indians, without the assent or permission of the Indian Agent? A. I did not know that the Indian agent's assent was essential at all.

Q. Did you not know at that time that the Indian Agent was authorized to put off the reservation any person who did not have his prior permission to be upon it? A. I did not.

Q. Did you have any authority from the Department to interest the Indian Agent, at the time of this letter, to take part in the new contract? A. We had no authority from the Department to interest

190 the agent in procuring this new contract, but we did have in the former case, and I assumed that it would not be objectionable in this case.

Q. You state that you had no authority whatever from the department to interest the Indian agent at the time of this letter in the matter of the new contract? A. We had not applied for any authority in this new contract.

Q. What authority did you have from the Department as to the original Maish and Gordon contract. Was it in writing or how? A. My recollection is that it was a letter written by the Indian Commissioner to the Indian Agent.

Q. Can you produce that letter? A. No; I have never seen that letter personally.

Q. Well, how do you know anything about it? A. Because my recollection is that Major Gwydir wrote us about the receipt of the letter, or that Maish and myself procured the pledge of the Indian Commissioner to write the letter. It has been so long ago now I cannot recall the details of how it happened.

Q. Did that include any permission or right on your part to offer the agent money for what he should do for you? A. We did not ask that or discuss that phase of it. Our idea was to compensate the agent for what he could legitimately do and only that.

Q. What could the Indian Agent legitimately do in connection with any person attempting to contract with the Indians on the Reservation, for which he could be paid compensation by 191 such persons? A. As he had no official connection, as I understand it under the law with the making of a contract, he could go out on the Reservation, as we contemplated having the original agent do, and explain to the Indians that our intentions were fair and legitimate, and use what personal influence he might to represent us favorably to the Indians.

Q. Did you not know at that time that it was a requisite of such contracts that the Indian Agent should certify that the Indians who made the contract came before him, know what it was about, and properly executed? A. Certainly, but there was no intention to compensate the Indian Agent for anything except the legitimate work of going out on the Reservation there outside of his official duties and aiding us in presenting the Matter properly to the Indians.

Q. Did not all the Indian Agent's time and duty belong to the Government? A. I don't know whether he had leisure in which he could do that, or not. The Government authorized him to help us, and I assumed that he had the leisure for it.

Q. Was a part of the service you expected from the Indian agent to explain to the Indians what would be a fair fee? A. I don't think that was in consideration at all. The question was never suggested that I can recall.

Q. Was it not desired that the Indian Agent should say to them that the contract was a good and proper one, and that you were a good man to have it? A. My recollection is that the Government wrote to the Indian Agent—

Q. No, answer my question.

192      (The question was repeated.)

A. Certainly, we hoped to have him do that, and we had been endorsed by the Government and the agent for that purpose.

Mr. PATRICK: I move to strike that out unless the endorsement is shown.

By Mr. PATRICK:

Q. Would the Indian Agent's certification or the Indian agent's certificate to that effect have been of any value, had he been a private individual? A. It depends altogether upon his relation with the Indians.

Q. But it was that service, was it not, in great measure, that you desired from him? A. We assumed of course, that his official position would give more weight to the representations as to our position and reliability than would otherwise be the case, and we assume that that was perfectly legitimate for us to do. We were not endeavoring to take any advantage of the Indians.

Q. Was it because of your desire to have him make that statement to the Indians that you used the expression, "but don't fail to get him"? A. Absolutely and only.

Q. I notice in your letter of February 2nd, 1904, to Major Gwydir here, the expression, "in meantime see the agent and if necessary double his fee. If you save the contract for us I will see to it that your own fee is increased." Do you still say that that was entirely

inofficial service on the part of the agent? A. Absolutely; 193 no specific amount had been agreed upon. I suggested cer-

tain figures to compensate the Indian agent, but, if necessary on account of his personal relations and acquaintance with them, and his supposed influence with them, I was perfectly willing to compensate him for his co-operation.

Q. After this letter of August 24th, 1903 in which you had authorized Major Gwydir to offer \$2500, and your letter of February 2nd, 1904, in which you authorized him to see the agent and if necessary to double his fee, do you still say that you were surprised when you heard that Major Gwydir had offered the agent \$5000—\$5000 being just double \$2500? A. I meant my surprise was as to the exact figure offered, because I did not know how much had been agreed upon in the former instance. I did not mean that my surprise was that that was an excessive figure as a contingent fee for such valuable service as we hoped to receive from him.

Q. The testimony in the Court of Claims of the offer of the \$5000 to the Indian Agent which surprised you referred to the original Maish and Gordon contract; did it not? A. Yes.

Q. And this authorization, or the offer of \$5000 to the succeeding Indian agent related to the new contract? A. Yes.

Q. Were you then willing to give \$10,000 to two Indian agents to get this contract? A. I was willing to pay \$5,000 to each of those agents as a contingent fee as a consideration for such services as we thought they could legitimately render to us.

194 Q. Did you not know at the time these letters were written that the Indian agent was prohibited by law—that it was an indictable offense for him to take a fee in any case in which

the Government was a party? A. In acting in any official capacity which would be inimical to the Government's interest in any way, I of course knew that it was—

Q. No; official or in any way. Do you not know that it was prohibited by law that any officer of the Government should take a fee, contingent or otherwise, in any matter in which the United States was concerned as a party?

Mr. ARCHER: I object to the question because it calls upon the witness for his opinion upon the law, as to which he has not been shown to be qualified to answer.

(The question was repeated.)

Mr. ARCHER: I object on the further ground that the United States has not appeared, by this examination, to have been a party.

A. We were dealing with the agent, as I have already stated, not in his official capacity at all.

By Mr. PATRICK:

Q. Did you not know or understand that an Indian agent could not deal privately in any contract in which the Government was concerned?

Mr. ARCHER: Same objection.

A. We had the authority to secure the co-operation of the Indian Agent, and I could only repeat that we were offering him what he considered compensation for services he could legitimately render.

Q. That does not answer my question.

195      (The question was repeated.)

A. Not under the conditions as stated there.

By Mr. PATRICK:

Q. You did procure the Maish-Gordon contract through the assistance of the Indian Agent at that time; did you not? A. And with the authorization of the government; yes.

Mr. PATRICK: I object to the amendment in the answer. I will ask the question over again.

Mr. ARCHER: I object to that.

By Mr. PATRICK:

Q. You did secure the original Maish-Gordon contract through the efforts of the Indian Agent at that time; did you not?

Mr. ARCHER: I object to that as having been fully answered. First, and second, as being irresponsible to the examination in chief, and third as being immaterial to the inquiry in reference to the new contract.

Mr. PATRICK: The plaintiff replies that this is direct cross-examination of the testimony of the witness volunteered by himself explaining the letter which appears in the record.

By Mr. PATRICK:

Q. You understood, did you not that the agent had aided in securing the Maish-Gordon contract? A. I don't know whether he did or not. I think he did.

Q. I am not asking what the fact was, but what you understood? A. I understood that he was giving us his co-operation.

Q. Do you expect to pay him the \$5000 promised him as 193 a part of the payment out of the fee in this case?

Mr. ARCHER: I object to that as being irrelevant to the inquiry and irresponsible to the examination in chief, and of no materiality, because the evidence is that the new contract was not obtained.

Mr. PATRICK: I am talking about the old contract.

A. No; because no agreement as a compensation was reached with that agent, although I did not know that fact until the case was put on trial at the Court of Claims; or I did not remember any such—

By Mr. PATRICK:

Q. You knew that you had authorized the offer to be made to him? A. I have already stated the way in which I authorized the offer to be made. I authorized him to be compensated for such services as he could legitimately render.

Q. Did you use the words "legitimately render" in your letter to Major Gwydir? A. I don't remember the phraseology of that letter.

Q. Did you not use the expression, "but do not fail to get him"? A. Yes, I did, because I considered that it was of great importance to have his co-operation just as we had in the former case with the other agent.

Q. Did you authorize or instruct Major Gwydir at any time to offer any compensation to any of the Indians in connection with the contract? A. I did not. I don't remember about that. I believe we did authorize him to secure the co-operation of 197 leading chiefs, and, if necessary, to compensate them for their trouble.

Q. You knew that the chiefs were the representative men of the agents; their head men; did you not? A. I did, but we were doing what we considered a perfectly legitimate thing in dealing with them, and we felt that it would greatly facilitate our success in securing the contract if the leading Indians would help us to explain to those who were not so well posted the nature of the contract and the purposes which we had in view.

By Mr. PATRICK:

Q. Please explain what you mean by the following expression in your letter of April, 1904, to Major Gwydir: "You can explain to the agent and to the Indians that owing to the delay in getting the new papers forwarded from Washington, you and some of your associates think it best to go ahead and take the new contract in the name of R. D. Gwydir and associates and that the Attorneys selected

will be the best and most available lawyers in Washington, and that they will be included in the term associates." A. I meant just what I said. I don't know how to make it clearer.

Q. Please explain what you meant in the same letter by this expression:

"I think a good stroke of diplomacy would be to have the Indian Agent, or whoever is closest to the Indians and has most influence with them, suggest to them that the wisest and safest thing in this new contract matter, is to have Gwydir, the man who is their friend and whom they know and trust to be one of the parties in the contract and that Gwydir can select as his associates some of 198 the best attorneys in Washington."

A. I mean exactly what I said.

Q. About the time of your and Robertson's agreement of March 28, 1906, did you hold out to him that he was to have a half interest in the fees that might come to you, or to both of you?

Mr. ARCHER: How—verbally or in writing?

Mr. PATRICK: I just asked "hold out" for this question.

A. I did, with the understanding that he was to secure a new contract.

Mr. PATRICK: I object. I want a categorical answer, yes or no, and an explanation can be made afterwards, if desired.

Mr. ARCHER: I submit that is what the witness is doing.

By Mr. PATRICK:

Q. The agreement of March 28, 1906, contains no reference to a new contract, does it? A. That is true.

Q. Did you about the same time hold out—

A. (Interrupting): Wait a moment. But, as I have already explained—

Mr. PATRICK (Interrupting): Objection is made to any explanation that shall qualify or alter or attempt to alter the agreement itself.

The WITNESS: I am not attempting—

Mr. PATRICK (interrupting): The question has been completely answered. It admits of an answer yes or no and nothing else.

Mr. ARCHER: I submit that the witness has a right to explain his answer, and it does not lie in the mouth of counsel to object to his explanation, since he brought out the answer on cross-examination.

A. (Continuing): As I have explained before, all offers or tenders of any compensation to Mr. Robertson were dependent as I understood it, solely upon procuring a new contract with the Indians. That was the sole basis of any relation between us.

By Mr. PATRICK:

Q. Did you have any more of a contract at that time with the Indians than Mr. Robertson did? A. No; but Mr. Robertson had agreed to help secure a new contract?

Q. You were not a party to the agreement to secure the new contract? A. Gwydir and Robertson were to secure the new contract out there, and I was to look after the interests under the new contract here in Washington.

Q. Yes; but you were not to be a party to the contract? A. Not to be one of the principals in whose name it was to be taken. I was to be a beneficiary under it if it was secured.

Q. Why were you not to be a principal? A. Because I thought it best to secure the new contract under new names.

Q. Why did you think it was best? A. Because the Indians were apt to be prejudiced against a renewal of the old contract under the same principals because we had not succeeded in securing an appropriation within the life of that old contract, and they were not in a position, as I then believed, to understand all the difficulties with which we had contended, and I thought it wiser to 200 secure the new contract with different principals.

Q. And yet, in your letter of August 24, 1903, to Mr. Gwydir, you said:—"am especially glad to know that you think we can secure an extension of our contracts. It seems to me you had better strike for at least five (5) years extension." A. I meant by that a renewal under a new contract.

Q. If you meant that why did you not say so to him, instead of suggesting the extension of the old contract? A. Because all my communications to him related exclusively to a new contract, and that was merely one expression of conveying the same idea.

Q. Did not Major Gwydir secure the first contract? A. He aided in securing it?

Q. And he was concerned and connected with the first contract? A. Certainly.

Q. All the way through? A. Certainly.

Q. Until it expired, if it did expire, by operation of law? A. Certainly.

Q. Did you about the time of this March 28, 1906, agreement, hold out to any other person that Robertson had an equal interest as yourself in any compensation or fee to be derived from this Indian contract? A. Not until the compromise which resulted in what is known as the Raleigh Agreement, had been decided upon.

201 Q. That does not answer my question whether you did.

You say you did not do it until a certain time. Please state whether you did hold out to other persons. A. After the concession was made, I did state that Mr. Robertson would be interested with me under that concession or compromise, which contemplated a direct appropriation by Congress, and was entered into for the purpose of securing a direct appropriation by Congress.

Q. Would that have benefited yourself and Robertson alike if it had been paid? A. Certainly but that concession was made under the statement made to me by Butler or Butler & Vale, that unless all parties agreed upon a division of the fee no appropriation would be made, and I yielded to that in order to save what looked like a desperate situation.

Q. What authority had Butler & Vale to speak for or to bind

Congress? A. I don't think they claimed any now, but they claimed relations with members of the Conference Committee and reported that that statement had been made by members of the conference Committee to them.

Q. Did you see members of the Conference Committee yourself?  
A. I did.

Q. Did Mr. Robertson see them? A. He states that he did.

Q. Don't you know of your own knowledge that he saw them, and in your company? A. I think he saw Mr. Du Bois on one occasion with me.

202 Q. What about? A. About the question of adjudication of contested interests between attorneys.

Q. It had connection with the appropriation by Congress at that session of the million and a half dollars that was appropriated to pay the Colville Indians? A. It had connection solely with the contest between attorneys.

Q. And Robertson and you were together at that time? A. Robertson,—what do you mean by together?

Q. Just what I said. A. Do you mean physically or associated together?

A. Well, answer as you please. A. We were together very often during that period.

Q. Were you not associated together and acting together in furthering the appropriation at that session? A. We were associated together and acting together in an effort to secure a compromise or settlement of the contest between attorneys.

Q. Your own entire interest in the matter was in the fee you would receive; was it not? A. Certainly.

Q. And the trouble or differences about the fee alone held up the appropriation for some time? A. I cannot answer as to that. That was the representation made to me, and it was my reason for making the concession.

Q. You so understood it? A. I understood that was the situation at that time.

203 Q. And if the fees were separately *or* arranged, so that Congress would be freed from that question, the appropriation would be made? A. That was the representation made to me, and my reason for making the concession.

Q. Did you not understand that \$150,000 would have been allowed directly by Congress had there not been any disputes or quarrels between attorneys respecting their fees? A. I don't know that that is true.

Q. Did you not understand it? A. That was the representation made to me, and it was upon that that I acted.

Q. Did you not so understand it at that time? A. I answered that question.

Q. No; you have not said what you understood. A. I understood that members of the Committee had stated that no appropriation would be made unless counsel agreed.

Q. Do you know whether Mr. Butler was urging before the Committee that you were entitled to no fee? A. I don't know what he

was urging before the committee. I was never present when he made any representation about the matter. I know that he was endeavoring to usurp a great deal more of the fee than he was entitled to under his contract with me.

Q. His contract with you related to the Maish and Gordon contract; did it not? A. Yes.

Mr. ARCHER: I object to any inquiry about his contract  
204 because the contract is in writing and speaks for itself.

By Mr. PATRICK:

Q. Please look at that *that* paper and see if it is a copy of what you referred to as the Raleigh agreement (handing paper to witness). A. (after examination). I think so. I have not seen the original since soon after it was executed, and I lost my copy.

Q. It is substantially correct? A. So far as I know it is a copy.

Q. That was printed, was it not, in the Court of Claims record? A. I think it was printed in the brief of Butler & Vale. It was not in the record; it was never introduced into the record. Butler & Vale repeatedly refused to produce it in spite of our earnest insistence that it should be produced.

Q. But it was printed in their brief, either substantially—

Mr. ARCHER: I shall not object to it on the ground that that is secondary evidence, if that is what you are trying to get around.

Mr. PATRICK: All right.

By Mr. PATRICK:

Q. There is nothing in that—

Mr. ARCHER (interrupting): I am willing, so far as the question of secondary evidence is concerned. It may go in if otherwise competent for the purpose of which it is offered, but I object to any examination about it.

By Mr. PATRICK:

Q. Did you at that time, on the 12th of April, 1903,  
205 represent to R. W. Nuzum, F. C. Robertson and Marion Butler, in this instrument of writing, of which a copy is handed to you, to which you have referred as the Raleigh agreement, that you and Robertson were entitled to share equally in the fee to be paid?

Mr. ARCHER: I object, as the question calls for a conclusion of the witness as to the legal effect of this paper.

A. That agreement was prepared by other parties and submitted to me for signature as a part of the concession, and the phraseology, beyond the fact of the interest assigned, was not noted especially by me at that time. I had never, up to the contemplated concession and compromise, recognized the right of Mr. Robertson to any interest in that fee, except under condition precedent to his securing the new contract.

Mr. PATRICK: I move to strike out all of the above answer that is not responsive to the question.

Mr. ARCHER: I submit that it is responsive.

Mr. PATRICK: I now offer in evidence a copy of the agreement of April 12, 1906.

Mr. ARCHER: For what purpose?

Mr. PATRICK: For the purpose of showing that representations were made by Mr. Gordon at about the time of the agreement of March 28, to Mr. Robertson and to other persons that Gordon and Robertson were to share equally in the fee to be paid for securing the payment to the Colville Indians.

Mr. ARCHER: I object to its being introduced for that purpose.

Mr. PATRICK: Then for the additional purpose of corroborative evidence tending to support the contention of the complainant as to the meaning of the written contract pleaded in the com-  
206 plaint.

Mr. ARCHER: I object to it for either of the purposes. First, I object to it that nowhere in the paper does it represent that Mr. Robertson was entitled to share in the fees, but simply recites, by way of inducement, that all the parties claim the right to participate in any appropriation, and makes a contingent agreement for a distribution, which, on its face, was dependent upon the appropriation of \$150,000; and under the second purpose for which it is offered, as stated by counsel, it is not competent to offer this on this witness' cross examination. If it is proper corroboration it should have been put in the chief. I move to strike it out for the reasons stated.

The copy of the agreement was received in evidence filed here, and marked "Complainant's Exhibit No. 3." It is in the words and figures following, to wit:

WASHINGTON, D. C., April 12, 1906.

This agreement made and entered into between Marion Butler on his own behalf and on behalf of his associate Counsel, R. W. Nuzum, on his behalf and on behalf of his associates, and Hugh Gordon and F. C. Robertson; Witnesseth:

That Wher-as, each of said parties mentioned herein have rendered services as attorneys for the Colville Indians and claim the right to participate in any appropriation made to pay said attorneys' fees;

"Now, Therefore, Provided the sum of one hundred and fifty thousand (\$150,000) dollars is allowed for the payment of  
207 attorneys representing said tribe of Indians then of the said sum eighteen thousand seven hundred and fifty (\$18750) dollars is to be paid to the said R. W. Nuzum for himself and associates and nine thousand three hundred and seventy-five (\$9375) dollars to Hugh Gordon and nine thousand three hundred and seventy-five (\$9375) dollars to F. C. Robertson; the remainder of said sum to be distributed by the said Marion Butler as he elects. Should the appropriation be less, then this agreement is to be the basis of

the distribution, sharing pro rata in such diminished sum, as the percentage is thereby diminished.

In witness whereof we have hereunto set our hands and seals at the City of Washington, the day and date above written.

R. W. NUZUM. [SEAL.]  
 HUGH H. GORDON. [SEAL.]  
 F. C. ROBERTSON. [SEAL.]  
 MARION BUTLER. [SEAL.]

**Mr. PATRICK:** The complainant now offers a copy of the agreement of March 28, 1906.

The copy of the agreement referred to was received in evidence and filed herewith, marked, "Complainant's Exhibit No. 4." It is in the words and figures following, to wit:

MARCH 28, 1906.

This agreement made between F. C. Robertson and Hugh H. Gordon, witnesseth, that they shall share equally in all monies appropriated by Congress, or allowed by the Interior Department, which may accrue to said Gordon or said Robertson as attorney fees, growing out of the rendition of services to the Colville tribe of Indians, whether allowed under the Maish-Gordon contract with said tribes, or on any other theory whatsoever, which said interest is to inure to either party, no matter in whose name such allowance is made. Both parties hereto to mutually labor to secure such allowance. Out of said Robertson's share he agrees to compensate R. D. Gwydir by a reasonable compensation. The fees to be divided between said Robertson & said Gordon as herein provided shall be the net sum accruing to said Gordon, after settling with other attorneys under contracts heretofore made by said Gordon.

F. C. ROBERTSON.  
 HUGH H. GORDON."

**By Mr. PATRICK:**

Q. Did you about the 3rd of April, 1906 represent and hold out to Marion Butler, F. C. Robertson, and Josiah M. Vale, of the firm of Butler & Vale, that Mr. Robertson was entitled to share in the fee in the case then pending before Congress.

**Mr. ARCHER:** I object, as the witness is entitled to be advised as to whether he is being interrogated about a written contract or hold-out or a verbal hold-out, and I advise him that if it is a written hold-out, he does not need to answer until he sees the writing.

A. Under advise of counsel, I decline to answer until I know to what you refer.

**By Mr. PATRICK:**

Q. Did you make such representation to them, or such hold-out, verbally, about that date in the city of Washington? A. 209 I don't recall the date of any such holding out that was made, and can only repeat that I never acknowledged, in writing to Robertson, any share or interest in that fee, except under the condi-

tion that he secure a new contract, until this compromise was under contemplation.

Q. What do you mean by "compromise" and "concession"? If Mr. Robertson had no fee and no claim, how was he in a position to compromise anything, or you to compromise with him? A. Because he was claiming to have an interest in the Maish and Gordon contract, and my position was that he had no interest, except such as was contingent upon his securing a new contract; and Butler's position was contested because he was claiming more than I believe he was entitled to legitimately; and the concession made by me to both as set forth in the so-called Raleigh Agreement, was under the distinct stipulation that it would secure a direct appropriation of the fee, and that refusal to do so would mean the loss of the entire fee.

Q. Did Robertson pretend to have any inside information as to whether the appropriation was going through? A. I don't know what his inside information was.

Q. Did he make any representations to you that he had such information? A. I don't recall about that.

Q. Were any such representations made by anyone except Mr. Butler; if so by whom? A. I don't recall any representations made, from personal knowledge, except Mr. Butler. I think several parties repeated Butler's statement with regard to the attitude of the Conference Committee.

210 Q. When did Robertson first make his claim that he was interested with you under the Maish-Gordon contract—when and where was it made? A. I never knew of any claim of Mr. Robertson that he was interested in the Maish-Gordon contract until subsequent to the execution of our agreement of March 28, 1903.

Q. How long afterwards? A. I don't recall how long.

Q. Was it a month? A. I cannot recall at all.

Q. When and where was it? A. It was made prior to the compromise, which was embodied in the so-called Raleigh agreement. That is as near as I can recall.

Q. Yet you have just stated that the Maish-Gordon contract was at that time dead and of no force and effect. What did Robertson's claim under that contract have to do with what occurred between you and these different parties at Washington about that time? A. Because, although the Maish-Gordon contract was dead, and we had practically abandoned hope of securing an appropriation under that contract, there was a possibility that the Congress might make an appropriation and credit the fee to services rendered under the Maish-Gordon contract, in spite of its expiration.

Q. Who made that statement, and when and where? A. You asked me for my reasons and I am giving them.

Q. That is only what you think. Did you have any information to that effect from any person? A. I don't know. I was acting upon my own judgment at that time. I don't recall what other people's opinions were.

Q. Was that merely your own thought, or did you have any knowledge on the subject? A. I had no definite knowledge as to what action Congress might take.

Q. When you received \$150 from Mr. Robertson through the mails, did you receive that money to be used for your own Gwydir's and Robertson's joint interests? A. It was to be used to pay the expenses of coming to Washington to prevent the approval of the so-called McDonald contract and thus protect the interests of Gordon, Gwydir and Robertson under the proposed new contract.

Q. Who knew of that condition of affairs except yourself? Did Gwydir or Robertson know it? A. I got my information from Mr. Robertson directly as to the McDonald contract and the suggestion as to the reason for me to come here.

Q. Is that letter in evidence? A. Yes.

Q. I show you a copy of the receipt given Robertson by you for that \$150. It reads as follows:

"Received of F. C. Robertson, of Spokane, Washington, one hundred and fifty dollars, with which to pay expenses of trip to Washington, D. C., to look after the interests of Gordon, Gwydir and Robertson in the matter of the claims of the Indians of the Colville Reservation against the U. S. Government. In case we succeed in collecting said claim, I agree that out of my share of the profits, I will repay to said Robertson the said one hundred and fifty dollars (150.00).

HUGH H. GORDON.

212 Did you mean that that money should be repaid to Robertson no matter in what manner or shape the money was received from the Indians; did you? A. I don't recall as to the intention, as to how that money should be repaid, whether it was contemplated that it should be repaid only on condition that we got the appropriation under the new contract, or whether I intended to repay it even though we got it under the Maish-Gordon contract.

Q. Now, when you and Robertson signed the March 28, 1906, agreement in Washington, did you not say to him that in view of that agreement he should release you from the repayment of this \$150? A. I made no such statement until after the compromise was signed, and then my recollection is that Mr. Robertson, recognizing the fact that he had been admitted into a share of the proposed appropriation, which was not originally contemplated, voluntarily made that proposition, in the presence of Mr. Nuzum, as I recall it.

Q. Then the agreement of March 28, 1906, did admit him into a share of the appropriation?

Mr. ARCHER: I object to that because the agreement speaks for itself, and the witness was telling what Mr. Robertson thought about it.

Mr. ROBERTSON: That is leading and suggestive and directly instructive to the witness, I submit.

Mr. ARCHER: I submit on the record that that is a fair objection to this inquiry and a proper pointing out to counsel the meat of his own question.

The WITNESS: To the witness, you mean.

213 Mr. ARCHER: No, to counsel.

The WITNESS: Oh, yes

By Mr. PATRICK:

Q. When did you ask for the return of your receipt? A. I do not recall the date. After Mr. Robertson left Washington, the request was made.

Q. Please explain why, if Mr. Robertson's only participation in this matter was connected with a new contract that never was obtained, that could never have been obtained, and that there was no purpose in obtaining prior to the appropriation made these Indians, he should release you from the payment of that \$150 for an agreement between you and himself to share in the appropriation, which was not to take effect until after he had secured the new contract, which was not to be obtained, as everyone knew.

Mr. ARCHER: I object to so much of that question as assumes that the new contract could not be obtained.

Mr. PATRICK: Well, I will withdraw that.

A. I am ready to answer that question.

Mr. PATRICK: All right, if there is no objection to it.

Mr. ARCHER: I object to so much of it as assumes that the contract could not be obtained. Aside from that, I have no objection to it.

Mr. PATRICK: Well, the matter has been withdrawn.

By Mr. PATRICK:

Q. Please look at the paper I hand you and see if you signed that paper (handing paper to witness). A. (After examination.) I think that is my signature.

Q. Don't you know it is? A. Yes.

Q. About the date, 3rd of April, 1906?

214 Mr. PATRICK: I now offer this paper in evidence.

Mr. ARCHER: Let me see it before it is offered. (After examination.) I have no objection to it.

The paper referred to was received in evidence and filed herewith, marked "Complainants' Exhibit No. 5." It is in the words and figures following, to wit:

"The undersigned hereby stipulate and agree that their respective claims for services rendered the Colville Indians be submitted to the Conference Committee of the Senate and House of Representatives on a quantum meruit, and agree to stand to and abide by any award which shall be made in the premises, and in case no award shall be made the rights of the said parties shall remain unaffected.

This the 3rd day of April, 1906.

HUGH H. GORDON,  
*For Himself and Associates.*

MARION BUTLER,  
*For Himself and Associates.*

F. C. ROBERTSON,  
BUTLER & VALE.

*All Services Subsequent to Formation of Copartnership.*

The WITNESS: I want to state that this agreement to submit this question of the rights of the respective parties to compensation was signed by me because of the claims made by Butler and others, and which were disputed by me.

215 Mr. PATRICK: I move to strike that out on the ground that that has reference to a matter about which the witness is not being interrogated.

The WITNESS: It was submitted to me for identification.

Mr. ARCHER: I do not want you to argue it on the record Mr. Gordon.

By Mr. PATRICK:

Q. This agreement was voluntarily entered into by all the signers; was it not? A. It was voluntarily entered into by me. I do not know what the motives impelling the others were.

Q. Did you and Mr. Robertson go before the Conference Committee or Sub-Committee with this agreement? A. We went to see Mr. Du Bois with reference to a hearing on a similar proposition. I don't know that this question was discussed—that that particular paper was discussed.

Q. You went before him with a document substantially like this? A. We went to see Mr. Du Bois in reference to a hearing as to the contested rights of different attorneys.

Mr. ARCHER: Could we not have an understanding that he means Senator Du Bois, who was on the Indian Committee?

Mr. PATRICK: Yes.

By Mr. PATRICK:

Q. What was his reply? A. He stated, as I recollect it, that he or the Committee—I forget which—would not go into a wrangle with attorneys as to their respective interests.

216 Q. Please state whether he also added to that that if the attorneys interested made a contest before the Committee respecting their fees, the appropriation probably would not pass at that session? A. I recall no such statement from him.

Q. Did you hear that from him? A. I have already stated that Butler & Vale made such representations to me.

Q. Why did you not go before the Committee under this agreement? A. I have already stated why—because Senator Du Bois declined to entertain the question of arbitrating the matter.

Q. You were willing to go before the Committee? A. On our respective rights?

Q. Yes. A. I certainly was.

Mr. ROBERTSON: With permission of counsel I would like to ask Mr. Gordon a few questions, as I am somewhat more familiar with the details than Mr. Patrick.

By Mr. ROBERTSON:

Q. Butler & Vale claimed that they had agreed to compensate attorneys other than those mentioned by you, Major Gordon, did they not, out of the money that they were to receive? A. I think so

My recollection is that they were claiming that they had to compensate attorneys or parties—they did not say attorneys, but parties—whom they declined to name.

Q. And the extent of their obligations they claimed to about equalize in this division the amount of money that was to be 217 parceled between the various persons; in other words, they claimed that they would receive a fee of \$20,000, after discharging certain obligations that they had assumed? A. I do not recall the details of their claims, except as I have stated; but I only know that my consent to arbitrate that matter—

Mr. ROBERTSON (interrupting): That is not responsive.

Mr. ARCHER: If you want to insist on an answer, we will have the question read and see if we can get it.

Mr. ROBERTSON: Yes. Read the question, please.

(The question was read by the Stenographer as above recorded.)

Mr. ARCHER: How much of that has he answered?

Mr. ROBERTSON: He has not answered that at all.

The WITNESS: Yes I did. Read my answer.

(The answer was read by the Stenographer as above recorded.)

Mr. ROBERTSON: The last part is absolutely irresponsible.

Mr. ARCHER: Strike it out.

By Mr. ROBERTSON:

Q. Now, Nuzum was claiming for services that he claimed to have rendered under what was then claimed to be the McDonald contract; was he not? A. I think so.

Q. And Nuzum claimed that he and Judge Gordon of Spokane, and others had brought, with the former Indian Agent Anderson, several of the chiefs—Barnaby and others—before the Indian Affairs Committee the year before; is that right? A. I think he made that claim.

Q. And he was claiming that he had rendered services for the Colville Indians, independent of the Maish-Gordon contract? A. And that was—

Q. (Interrupting.) Answer that yes or no. A. I think so, but I—

Mr. ARCHER (interrupting): Wait a minute. Do you want to make an explanation.

The WITNESS: Yes. I disputed Mr. Nuzum's claim on the ground that he was claiming services under a contract that was never approved, and which was represented to have been procured by fraud, and these services were therefore purely voluntary.

By Mr. ROBERTSON:

Q. Yes; but he was claiming the contrary was he not? A. I think so.

Q. Now then, in order that whatever services had been rendered by the respective counsel might be reduced to a certainty, this contract to submit it to the Conference Committee was entered into? A. My understanding of that contract was that the conference Com-

mittee was to hear the merits of the claims of each party claiming under that contract, and decide then, after a full hearing. That was my reason for consenting to it.

Q. You knew then that Hugh H. Gordon for himself and associates was claiming for services rendered to the Indians, and so stated in this stipulation, did you not? You knew that Marion Butler for himself and associates was claiming— A. (Interrupting.) To save time, I knew that all of them—

Q. You knew that F. C. Robertson was making a claim? 219 A. Yes.

Q. Now then, this claim being made by the various parties, it became apparent, as I understand, from your conference with Senator Du Bois, who was a member of the Conference Committee in the Senate, that this opportunity to try this claim was denied to respective counsel? A. Yes.

Q. Now, again, the attorneys got together and began to figure on what they would be entitled to have paid them, and I ask you if in this conference with Mr. Butler, did you on your behalf and on my behalf, state that the amount of money that should be paid to us in this division would be equal? A. I did after the concession already stated was under contemplation.

Q. But I don't contend that I made any concession in order to enable you to do that, do you? A. You most assuredly did not. The concession was all being made by me.

Q. In other words you had a written contract however, that had been previously executed, that is pleaded in the bill with me of some character? A. Yes.

Q. Now, under the terms of that written contract, not qualified by your oral statement, it would appear that we were to share at some time equally in the result of the moneys to be obtained paid by us as attorneys representing the Colville Indians? A. That is the contract as appears on its face, irrespective of the evidence of previous arrangements.

Q. Now previous to that time you had sent a receipt to 220 me, hadn't you, in which you promised to repay \$150 out of your share of the proceeds? A. Yes.

Q. All right. And you had written to Major Gwydir, hadn't you, that he would be taken care of equally with you and me were a new contract procured. Is that right?

Mr. ARCHER: Wait a moment. If that letter is in the record—

A. My recollection is that I wrote Major Gwydir—you are asking for my recollection.

By Mr. ROBERTSON:

Q. Yes. A. I wrote Major Gwydir that if the new contract was procured, 25 per cent of the fee secured under the new contract was to go to him and to you, 25 to myself, and the balance to be used in procuring counsel upon the best terms possible, and any amount saved above that should be added to the respective interests of that division.

did not. I never read that testimony at all, until after I came here to Washington city.

Q. What did you do with it after you received it from me? A. I laid it on my table. I never read it.

Q. At that time you had not intervened; had you? A. No.

Q. And a letter accompanied that testimony stating that it was transmitted to you, and referring to that so-called agreement 225 and the fact that our interest was preserved, as I believed it. Did you ever answer that letter to me? A. I don't recall that I did.

Q. Then you started to write to Major Gwydir, asking him, to keep absolutely secret from me what you were doing there, didn't you? A. I don't recall making any such request. I remember writing to him after your suit was instituted.

Q. I will show you a letter, dated Washington, D. C., November 18, 1907, addressed to Hon. R. D. Gwydir, Spokane, Washington, beginning "My dear Gwydir," consisting of five and a half pages, and signed Hugh H. Gordon, headed 2022 N Street N. W., and ask if that is your letter (handing same to witness). A. (After examination:) Yes, that is my letter. It was written after the institution of your suit against me. (After further examination of letter:) This letter was written at the time I came to Washington to intervene.

Mr. ROBERTSON: We now offer that letter in evidence.

Mr. ARCHER: I have no objection to that letter.

(The letter referred to was received in evidence and filed herewith, marked "Complainant's Exhibit No. 6.")

By Mr. ROBERTSON:

Q. Major Gordon, I now show you a letter, headed 2022 N Street, N. W., Washington, D. C., December 19, 1907, beginning "Hon. R. D. Gwydir, Spokane, Washington, My dear Gwydir," consisting of three letter sheets and signed, "Faithfully yours, Hugh H. Gordon," and ask if that letter is in your handwriting, and whether you transmitted it through the mails to Major Gwydir. (Handing letter to witness.) A. (After examination:) Yes.

226 Mr. ROBERTSON: I offer this letter in evidence.

(The letter referred to was received in evidence and filed herewith, marked "Complainant's Exhibit No. 7.")

By Mr. ROBERTSON:

Q. Now, Major Gordon, was not your repudiation or refusal to proceed in association with Butler & Vale due to a thought that occurred to you after you left Washington in 1906? When you first went there you expected them to represent you, did you not in this case, to file a petition in their own name and go on under this contract which has been introduced? A. Yes. I did at that time.

Q. What changed you, Major? A. Why in the conviction that my rights were not represented under that agreement, and that Butler & Vale had declined to agree, that agreement signed at the

Raleigh had failed of consideration, and that it left me at liberty to proceed independently in the Court of Claims.

Q. And then you returned to Washington to take up that position? A. Yes.

Q. That occurred to you on reflection at Biscayne, did it? A. It occurred to me after the failure to secure a direct appropriation.

Q. Well now, it did not occur to you before Mr. Nuzum and I left Washington, did it? A. No.

Q. So that when you left it was understood all along the line that this bill would go through as agreed? A. Provided a direct appropriation was received?

227 Q. Now, on May 23, 1906, did you not address a postal to Major Gwydir, beginning "My dear Gwydir," signed Hugh H. Gordon, from Biscayne, Fla., the postal being the one I now hand you? A. (After examination:) Yes sir, I wrote that.

Mr. ROBERTSON: We now offer this postal card in evidence.

Mr. ARCHER: No objection.

(The postal card referred to was received in evidence and filed herewith, marked, "Complainant's Exhibit No. 8.")

By Mr. ROBERTSON:

Q. In that card you stated:

"I wrote to you some days ago to send one of the contracts on here to Butler & Vale. They now say they will need all the copies—that is the contracts with all the tribes. You will remember I had them expressed to you about two years ago. Butler & Vale say they will need all these copies to put our case through the Court of Claims to which it has been referred."

Did you mean Major Gwydir's case and your case in that reference to "our" case? A. I meant the case as agreed upon in the Raleigh agreement.

Q. So that you were then figuring that that was the case referred to the Court of Claims, that the testimony should be furnished Butler & Vale, and that they were the parties that would put our case through? A. That is true. At that time, I was assenting to that arrangement.

228 Q. And that Raleigh contract included compensation for you and me equally? A. Yes. As I have already stated, it was made under the conditions stated.

Q. Now, then you knew that I was preparing, or did authorize in the preparation of testimony in Washington, to show the extent of the services that were rendered by you and your associates there, including Major Gwydir, in helping these Indians to recover this money; did you not? A. I knew that after I got your letter in Florida that you had testified as to your own services there in Washington—in the matter of your alleged services.

Q. Now then, you knew also that I also was claiming that I had an interest equally with you in that contract? A. Yes. You claimed that.

Q. Now if you were denying that, why didn't you inform me by letter that the position I was taking then, that I was equal with

you or that I was to be protected by you, was wrong, and that you were claiming that I had no agreements of any kind? A. Because I had taken that position all along up to the Raleigh agreement. I had never admitted, up to the time the Raleigh agreement was contemplated, that you were entitled to any share of my fee, except on condition of securing a new contract.

Q. Why, as a matter of fact, you had absolutely abandoned this litigation to others here years ago; had you not? A. No, indeed, I had not. I had employed counsel. They were all helping me—every mother's son of them.

229 Q. You say in this letter of December 19, 1907:

"I have yours of 11th Dec. and am glad to hear from you. You have evidently misunderstood my letter. If you will read it again, you will see that I am not trying to find out what Henderson *is doing now* or what he has been doing since we *secured the appropriation*.

"What I am after is to ascertain whether or not he was in the plot with Butler & Nuzum & McDonald & *and* the crowd who have tried to beat us out of our rightful interest in this fee."

You refer to "us," "our," and "our rightful interest in this fee." A. Those were under the Maish-Gordon contract and he was one of the parties under that contract.

Q. In this letter you are talking about Gwydir. You say:

"What I am after is to ascertain whether or not he was in the plot with Butler & Nuzum & McDonald & the crowd who have tried to beat us out of our rightful interest in this fee."

A. I am talking about Henderson.

Q. I am talking about Gwydir. A. I am talking about—

Q. (Interrupting.) In the letter of December 19, 1907, you say:

"What I am after is to ascertain whether or not he (meaning Henderson) was in the plot with Butler & Nuzum & McDonald & the crowd who have tried to beat us out of our rightful interest in this fee."

I ask you if the man whom you said had a rightful interest 230 in the fee was not Major Gwydir. A. I meant Gwydir and myself under the Maish Gordon contract.

Q. You further say:

"You knew both Butler & Henderson were employed by Me. They had no contract with the Indians. They were my attorneys and my representatives and were both by their contract and my professional honor bound to be loyal to me and to my interests. My belief is that Henderson was just as treacherous as Butler and that he went into the plot with Butler to rob me and you and May and every other honest man in this case."

You were then referring to an interest that Major Gwydir had in the case? A. I was referring to Gwydir's and my interest under the Maish-Gordon contract.

Q. Why didn't you say it? Why did you leave your letter subject to the interpretation that you meant his present interest in that contract of 1907, if that is what you meant? A. Because it was under the Maish-Gordon contract that Henderson and I had any

relation at all. Henderson had nothing to do with the new contract; nor Butler & Vale, except when we were contemplating getting them to act for us in the new contract.

Q. Were you not, in that letter, conceding that Gwydir had an interest in that fee as appropriated by Congress? A. I don't recall what my intention was at that time. I may have so thought then, and I took the position that Mr. Gwydir was entitled to it.

231 Q. You say in that letter to Gwydir:

"If we secure 15% you will be promptly paid your \$30,000 (for yourself & Hall and your other associates) and if we get 10% only, you will get promptly your \$20,000 (to be divided between you three)."

A. That is right because I was claiming in the Court of Claims that I was the sole representative of the Indians and that the fee should be paid to me in full, and I would then settle with those parties who had legitimate claims against me under the Maish-Gordon contract.

Q. You said to him in that letter:

"If we start any division in the Court, we are liable to have a lot of complications with these claims by these outside interlopers, but if all our friends will concentrate in asking the Court to pay the fee to me—which is the only legal and only right thing to do, I believe our fight against Butler and these outside schemers will be greatly strengthened."

A. Certainly, I said that.

Q. Were you not then recognizing Gwydir's right to recover an interest? A. Under the Maish-Gordon contract, certainly.

Q. An interest in the money that might be awarded by the Court of Claims under this bill of reference? A. Under the Maish-Gordon contract, certainly.

Q. Under the bill in reference, without regard to any contract? A. I was referring solely to the Maish-Gordon contract the rights under that Maish-Gordon contract.

Mr. ROBERTSON: Read the question.

232 The stenographer read the question, as follows:

"Q. Under the bill of reference without regard to any contract?"  
A. I have answered it.

By Mr. ROBERTSON:

Q. Then you were claiming this, Major Gordon: The right to receive this money in your name and to pay those men who were justly entitled to it under sub-contracts from you? A. Certainly.

Q. And you so averred in that bill in the Court of Claims? A. Yes.

Q. And you so assert now? A. I assert that now. If I had been paid the entire fee appropriated by the Court of Claims, I would settle with each party who had a legitimate claim against me.

Q. Were you going to do the same thing under that Raleigh agreement? Suppose Congress had appropriated this money under the Raleigh agreement and you had gotten \$9250, were you going

to pay Gwydir out of that? A. You would have taken care of Gwydir in that case.

Q. I was to take care of Gwydir? So it was understood that I was to take care of Gwydir, no matter how the appropriation was made? A. If you had been paid direct, you were.

Q. Under that Raleigh agreement then I was compelled to take care of Gwydir, by reason of the previous statement that I should do so? A. I don't get the significance of your question.

233 Q. You say in the Raleigh agreement I was to take care of Gwydir. How do you know that I was to take care of Gwydir? A. I don't know that you were to take care of Gwydir under the Raleigh agreement. You were to take care of Gwydir under the agreement of March 28, 1903.

Q. You were to take care of Gwydir under the Raleigh agreement or leave him out in the cold—which? A. I don't know what would have been the right thing to do under the Raleigh agreement.

Q. Is it not a fact that you did know that you had protested Gwydir with this agreement of March 28th with me? A. That was under the new contract.

Q. Well, you had under the Raleigh contract, to; had you not? A. If you related the contract of March 28th to that, you did.

Q. Did you relate it to it or not—yes or no? A. After the compromise, Yes.

Q. So you construed the two contracts together or against each other, or how? A. I construed the two contracts as one relating to a direct appropriation, and if the direct appropriation had been made I would have been bound by the stipulations of the Raleigh agreement.

Q. As that appropriation would be made to you and to me equally, and I had agreed to take care of Gwydir, you insist that I had to pay Gwydir under such conditions, or would you have

234 had to pay him? A. I don't know who would have had to pay him in case the direct appropriation had been made.

Q. Well; he was not to be paid at all; was he?

MR. ARCHER: I submit that the contract speaks for itself. It is in the record, and I object to the inquiry on that ground.

By MR. ROBERTSON:

Q. What I want to know is this: You don't explain under the agreement of March 28th I had to pay Gwydir anything out of any money I received; do you? A. No; (meaning out of money received by award of Court of Claims).

Q. Or that you will have to pay Gwydir out of any money you receive? A. Under the contract of March 28th—you would have to pay Gwydir under the new contract.

Q. Well, but there was no new contract. A. One was contemplated, though, when that contract was signed.

Q. That is what you say. That is your claim of it. A. Yes.

Q. You say, however, it would have been a very foolish thing to have understood conditions and to have contemplated it? A. Well, I did not understand the conditions at that time. That is right.

Q. Did you ever sign anything without lining it over in your mind and figuring every condition over forty times? A. Well, I usually read what I sign.

235 Q. You are a very careful man, are you not? A. No; I am sorry to say I am not.

Q. For instance, when you got this money, this \$150, the memorandum was written on the back of an old note, was it not, and you said you inferred therefrom that the note was intended to be executed by you—— A. (Interrupting): I didn't say anything of the kind.

Q. What did you say? A. I simply said I give you a receipt for \$150.

Q. Didn't I render you this money in an envelope, with a memorandum written on the back of a note, that was called to your attention or that you called to my attention? A. I don't recall that detail.

Q. Now, Major Gordon, after 1906, how did you expect to pay Gwydir, from what money did you expect he would be paid—out of the money allowed to you, or to you and Maish jointly, or to you Maish and me, or how? A. I don't know how we would arrange with Gwydir at that time. I was ready to do whatever was right by Gwydir.

Q. You have written to him since that he has no claim on you, either morally or legally, at any time. A. After the decision of the Court of Claims denying my rights under the Maish-Gordon contract, yes.

Q. You directed him how he should testify in this present case, did you not, in a letter—— A. (Interrupting): I asked him to give me an affidavit in reference to your relations with me out there, because I thought it was right and just that I should have it. I was not dictating as to how he should testify.

235 Q. Now, how was it, Major Gordon, that in your letter of 1905 you stated that all rights under the Maish-Gordon contract had ended? Was that correct? That was your opinion then? A. After the expiration of the contract they ended.

Q. All right, and—— A. (Interrupting): All legal rights.

Q. And while the Maish-Gordon contract was still in existence, you wrote to Major Gwydir, didn't you, to take this contract in the name of your father so that you could cut out all of the other parties who had contracts with you under that contract? A. I did not suggest that for any such purpose.

Q. Did you not so state in your letter? A. I did not. I said that we would take care of parties who had dealt with us in good faith.

Q. Did you not also, in subsequent letters to Gwydir, state that the reason you wanted him to take that in the name of Gwydir and his associates was to make a complete new deal of it, so that you did not have to recognize these other people, although they had rendered services, unless you wanted to? A. So that we would recognize only those who had dealt with us in good faith?

Q. Now, you qualify, every time, these questions with a twinge

of an argument favorable to yourself; don't you? A. I do not. I am simply stating facts as to my intentions.

Q. Didn't you know that an attorney, a partner in a fee, could not justly or fairly to his associates, during the existence of a contract, consider negotiations looking to the renewal of a contract, in names of persons other than his associates? A. It depends upon whether those associates had been acting in good faith.

Q. You contended in the Court of Claims, didn't you, that Maish was not entitled to anything, because he died, and nothing was done under the Maish-Gordon contract? A. That was my legal right and as surviving contractor his interests reverted to me; but I distinctly stated that I would waive that, and Maish would be paid the legitimate amount that would come to him for his services.

Q. You are now claiming in a cross-bill filed in this suit all the Maish money? A. I am.

Q. Why? A. Because if the decision of the Court of Claims is to be upset, and other parties who have no legitimate claims against me are to come in against me and are recognized, then I want my rights, as well as my burdens to be taken care of in these courts.

Q. By what right do you claim all of Maish's money? A. By the right under the law of the surviving contractor.

Q. You mean to say that the living taketh all that belongeth to the dead; is that right? A. I mean that under the law all of Maish's interest reverted to me upon his death.

Q. How about his heirs? A. I say his entire interest reverted to me.

Q. What became of his heirs? A. They had no such interest, except such as I was willing to concede to them.

Q. You say that this Maish \$6,000 is properly, under the law as you construe it, moneys coming to you by reason of your 238 survivorship? A. Yes sir.

Q. And now you claim to be entitled to \$20,000 under this procedure? A. I claim to be entitled to the amount awarded to me by the Court of Claims, and that only; but if the court of Claims' decision is not to be res adjudicata of all interests and parties claiming under contracts with me prior to that adjudication are to be recognized, then I have taken the position that my legal rights as to the Maish interests should also be recognized.

Q. What I want to know is this, without discriminating too finely; do you contend that you are entitled, if this Court makes a decree with reference to the disposition of that money along the line indicated in the Gwydir decision that has already been made—do you contend that in addition to this \$14,000 you will be entitled to the \$6,000? A. I contend that if the finding of the Court of Claims is not sustained, then I am entitled to the interest of the Maish estate.

Q. How about the money that Butler & Vale have got? Aren't you entitled to that also? A. I think I would be entitled to \$18,000 of that under a just adjudication.

Q. But you have not asked for that? A. Because—

Mr. ARCHER (interrupting): I object to any further inquiry as to what has been asked in his cross-bill, it being present and subject to inspection of counsel, and I should say it is the statement of what his claim is, although I did it myself.

239 By Mr. ROBERTSON:

Q. Then how much of the May money do you claim? A. I don't claim any of the May money.

Q. How much of the Henderson money? A. I am not presenting any claims, except in the Maish estate, because these other parties have settled that.

Q. Well, you have an existing claim against them, as I understand. A. No; I have no claim, under any conditions, against May and Henderson, unless the transfer of their original contract to other parties was clearly illegal and voided their interest. Upon that I do not insist now.

Q. Have you got a little inside deal with them that you will not insist? A. No; I have not.

Q. You lead Major Gwydir to believe in your letters, all through, that he would be taken care of by you at the end, no matter how you should be compensated, or in what manner the money should be paid to you?

Mr. ARCHER: I object to that as being irresponsible to the examination in chief, and on the further ground that the letters speak for themselves, unless counsel refers to some letters that are not in the record or some other communications.

A. I made no such statement as that. I led Gwydir to believe, and fully intended to pay him, without regard to any technical defects, in case the Court of Claims had paid the fee to me or recognize my rights under the Maish-Gordon contract.

Q. Why didn't you pay him the proportionate amount  
240 under the sum allowed you, so that he would get a little something out of it for all these years of work? A. Because the amount allowed was not allowed in the capacity of contractor and under the terms of the Maish-Gordon contract, but was payment solely for my personal, individual services, and Gwydir had the same avenue of relief open to him that I did, and as he did not avail himself of that, I did not think it just that I should be called upon to pay him a percentage contemplated under our original agreement, when that agreement was not recognized by the Court of Claims.

Mr. PATRICK: I will resume.

By Mr. PATRICK:

Q. In your original answer to the Robertson bill, you stated that in his (Robertson's) said testimony plaintiff set up his alleged claim for one-half the defendant's interest for which he now sues, that his alleged claim for one-half defendant's interest was before said Court in its deliberations, and that plaintiff having submitted himself to the jurisdiction of that Court is bound by its decrees, and the matter is res adjudicata. Can you point to any place in the

record in the Court of Claims where Mr. Robertson presented this March 28th, 1903 agreement? A. No; he did not present that March 28th, 1906 agreement.

Q. Can you point to any place where he presented to that Court any claim equally with yours, to the fees? A. My recollection is that he testified in his deposition of September 27, 1906, and claimed one-half the fee.

241 Q. In your amended answer you state:

Defendant avers that the complainant in the said Court of Claims appeared and submitted his claim to one-half of the compensation to be awarded to this defendant." Is that a fact or is it a mistake?

A. It is a mistake so far as personally appearing is concerned. I did not mean personally appearing. I meant that his claim was before the Court.

Q. Did he present any intervening petition? A. He did not, that I know of.

Q. Was he represented there by any attorney? A. Not to my knowledge, but his claim was considered by the Court of Claims, and I understood in his testimony that he had asserted his right to one half of the fee.

Q. Did you serve him a copy of your own intervening petition? A. No; I don't think so.

Q. Did you ever tell him you were going to intervene? A. No.

Q. Or that you had intervened? A. No. It was a matter of public record here.

Q. Had you intervened when he gave his testimony in Spokane? A. No.

Q. Don't you know from an examination of the records of the Court of Claims, and from your participation in all the hearings there, that Mr. Robertson did not appear and submit his claim to one-half the compensation to be awarded you? A. I have stated that

Mr. Robertson did not appear personally but that——

242 Q. (Interrupting): Or that he appeared either personally or by attorney? A. Or by attorney, but that his testimony making that claim was before the Court.

Q. Can you take the testimony and point to the place where he makes that claim? (Handing copy of testimony to the witness.)

A. (Referring to copy of testimony): I don't recall.

Mr. PATRICK: Never mind, I will withdraw the question.

By Mr. PATRICK:

Q. In your cross-bill filed May 6, 1909, is this statement:

"—that the said Butler, Vale, Henderson, May and Robertson have each accepted and received the said respective sums so awarded to them and have duly acquitted the United States in consideration thereof of all liability and claim on account of any services rendered or claimed to be rendered.—"

Is that not a mistake as to Mr. Robertson? A. I think now it is a mistake as to Mr. Robertson. I understand since that was inserted in the cross-bill that the amount was drawn from the Treas-

ury by the receiver. I was informed that Mr. Robertson had drawn it personally.

Q. When did you ascertain that, since filing the cross-bill? A. Yes sir.

Q. In your petition filed on the 1st day of December 1908, asking the removal of receivers in this cause did you not make this statement:

“That said Receivers duly qualified and have received  
243 from said Treasurer of the United States said sum of \$23000  
as said Receivers, and now hold said sum as said Receiv-  
ers”—referring to the \$14,000 awarded you, the \$6,000 awarded to  
Maish, and the \$2,000 awarded to Robertson. A. Yes. The  
\$23,000 was a clerical error.

Q. It should have been \$22,000? A. Yes sir.

Q. But reading \$22,000 for \$23,000 you made that statement December 1, 1908? A. I think so.

Q. At that time you knew the money had been paid directly by the Treasurer of the United States to the receivers in this cause, and had not been paid to Robertson? A. I see now that that is true, but the fact escaped me at the time.

Q. In the March 28, 1903 agreement after reciting, “which interest is to inure to either party, no matter in whose name such allowance is made” you say, “Both parties hereto to mutually labor to secure such allowance.” Please state in detail everything you have done up to the present time to secure any allowance to Robertson. A. I have done nothing to secure any allowance to Mr. Robertson. I didn’t think Mr. Robertson was entitled to anything, unless he secured a new contract with the Indians.

Q. You have read Robertson’s testimony in the Court of Claims? A. Yes.

Q. And you read his statements of your own collaborations with him and your own services in connection with the claims so 244 far as he knew it? A. Yes sir.

Q. Please name any act of Robertson’s inimical or hostile to the allowance of compensation to you? A. I know of no act inimical to compensation to me, except his claim for compensation in the absence of any securing of a new contract.

Q. Compensation to himself, you mean? A. Yes.

Q. Did he not at all times aid you, Butler & Vale, and the Indians to secure the appropriation? A. I don’t so recognize.

Q. Did he do anything against you or the Indians? A. I don’t know that he did anything against me. I don’t think he did anything to aid the appropriation.

Q. But I am asking did he do anything against the Indians’ claim? A. Not to my knowledge.

Q. Have you admitted the claims of any lawyer interested by you in the litigation, if so, whom? A. I have admitted the claims of everybody as adjudicated under the Court of Claims; that is I acquiesce in them.

Q. Did you contend before the Court of Claims that anyone except yourself was entitled to anything? A. I contended that

Gwydir, Hall and Edwards were entitled to compensation under the Maish-Gordon contract.

Q. Did you not state in the Court of Claims in the brief that you filed in that case, which was substantially your oral argument in it:

"The first parties employed by Maish and Gordon were Gwydir, Hall and Edwards, to whom a contingent fee of six forty-245 fifths interest in the Maish and Gordon — was pledged. This contract or assignment was never approved and recorded as required in Section 2103, Rev. Stat. Hence, their claim is not valid in law, and these claimants have therefore no legal standing in court. Furthermore, they are not 'attorneys' who rendered service as counsel in behalf of said Indians, and hence their claim does not come within the scope of this act."

A. I said that, and I said also, in spite of that fact, that if my contract was recognized I should pay them, in spite of that technical defect.

Mr. PATRICK: I object to the qualification.

By Mr. PATRICK:

Q. Did you not blot out of the original brief that was filed in the case the three lines which refer to your intention some time to pay them yourself? A. I did, under advise of counsel.

Q. Therefore, as presented to the Court, instead of being a request that they should be paid out of that fund, you opposed any allowance to them? A. On the contrary, that erasure was absolutely cured by my entire subsequent attitude in every paper filed by me in the Court, and I reiterated again and again my contention that Gwydir, Hall and Edwards were entitled to compensation under the Maish-Gordon contract.

Q. Are you willing they should be compensated out of the fund in this case? A. I don't think that they should have the same status under the present decision as they had under the decision for which they were contending.

246 Q. It is not the decision for which you are contending but the decision you got. Is the moral agreement the same now as it was then? A. No, it is not.

Q. Why? A. Because I am being paid simply for my personal services, and Gwydir and Edwards should have been paid for their personal services. If the matter is being paid on a personal basis, an exclusively individual basis, then I should not be taxed out of my individual compensation, not being paid as a contractor, to compensate them when they had the same avenue of relief open to them for individual compensation as was accorded to me.

Q. Gwydir worked right along for you, from before the first contract until about 1907, until after the appropriation, did he not? A. He worked under the Maish-Gordon contract, and also in an effort, as I understand, to secure, as he wrote to me, the new contract.

Q. But leaving out all reference to the Maish-Gordon contract or any other contract, he worked for you, in your interest? A. He worked for our joint interest.

Q. Whose joint interest? A. I say under the Maish-Gordon contract.

Q. Who was the other fellow to the joinder? A. Gwydir and myself, under the Maish-Gordon contract; and Gwydir, Robertson and myself under the new contract.

Q. He worked to your and Gwydir's joint interest. There-  
247 fore, if he worked to your joint interest, he worked to your interest did he not? A. Certainly.

Q. And he helped you in what was done, for which you were awarded judgment in the Court of Claims? A. He helped me to secure the contract—for the Maish-Gordon contract.

Q. And to prevent other people getting it. But whatever he did, regardless of the quality or quantity of his work was done in your interest, and helped towards your allowance of that fee? A. I recognize that fact, but had stated exactly my position.

Q. Have you, at any time, made any complaint to Gwydir or to anybody respecting Gwydir's faithful service to you? A. No.

Q. Do you consider that you owe Gwydir anything for those services? A. I don't think that under the present conditions I ought to be asked to pay Gwydir out of my individual award, which was exclusively for my personal services only.

Q. Supposing that the whole sum had been awarded to you in your name, and that you had owed Butler & Vale and Henderson and May and Robertson and Maish the amounts awarded to them, nothing being awarded to Gwydir or to anybody by name except yourself—assume for the sake of the question that the amounts awarded to those gentlemen would amend the amounts they were entitled to from you, would you then or not have owed Gwydir any-

thing out of the amount that was saved to you after paying  
248 the others? A. If the whole amount had been awarded to me, as I have already stated that I should have paid Gwydir and every man who had a legitimate claim against me.

Q. Do you consider that you owe him and Henderson anything? A. I do not.

Q. Or Butler & Vale? A. Butler & Vale have gotten under my contention, \$18000 more than they were entitled to.

Q. Do you consider that you owe anyone else who has performed services towards the payment of the Indian claim? A. I do not consider, that with the adjudication in the Court of Claims I am under obligation to anyone now.

Q. Never mind. Leaving out the adjudication in the Court of Claims, because that is the award of so much money, do you consider that you are legally or morally obligated to any person to pay anything out of the sum of \$14,000 coming to you? A. I do not.

Q. Then should it be held that the agreement between Mr. Robertson and yourself entitled him to one-half of the \$14000 there are no attorneys' fees, as I understand your answer, to be deducted from that sum prior to the distribution between yourselves?

MR. ARCHER: I object to the question, because it calls for the opinion of the witness as to legal liabilities.

A. If any sums are decreed as to any others by the Court they would certainly have to be paid before the division with Robertson.

249 By Mr. PATRICK:

Q. Please explain how you arrive at that conclusion? A. My position is that Mr. Robertson is not entitled, under the arrangements made with him, to any part of my \$14,000 to start with. In the next place, I contend that no other parties are entitled to any part of this \$14000; but if under contracts made prior to that with Mr. Robertson, an award is made by the Courts to them, and I am obliged to pay them, then it should come out of this sum before division, in accordance with the terms as stated in it, provided of course Mr. Robertson's claims are sustained.

Q. Stated in what? A. Stated in the agreement of March 28, 1906.

Q. That agreement between Robertson and yourself related only to attorneys, didn't it? It had nothing to do with anybody who was not an attorney?

Mr. ARCHER: I object. I submit that the contract speaks for itself.

A. I have stated that any division would be subject to the conditions of that contract.

Q. You mean the contract of March 28, 1906? A. Yes; provided of course Robertson's suit against me is sustained.

Q. Do you contend that the claim of Gwydir, Hall and Edwards, if allowed, is to be paid by you independently of the Gordon-Robertson agreement?

Mr. ARCHER: I object, because the question is not responsive to the examination in chief and because it calls for a legal conclusion on the part of the defendant as to the effect of the language in that agreement, and upon the further ground that it asks him what his contention is, which can reflect no light upon the question at issue in this case.

Mr. ROBERTSON: The word "contend" being used synonymously with the phrase "is it your interpretation of the contract."

Mr. ARCHER: Then, I object, as that calls for a conclusion of law.

A. My contention is that—

Mr. ROBERTSON (interrupting): Read that question.

The question was read by the stenographer, as follows:

"Q. Do you contend that the claim of Gwydir, Hall and Edwards, if allowed, is to be paid by you independently of the Gordon-Robertson agreement? A. I contend that the provision to pay Gwydir alone is an indication that the new contract solely was contemplated, and if this contract was sustained on the ground that Robertson was interested in the Maish-Gordon contract, then I should insist that he should pay the entire sum under the Maish-Gordon Contract—pay Hall and Edwards all—if this contract is sustained on that basis.

By Mr. PATRICK:

Q. Do you consider that under that agreement between Robertson and myself, Gwydir, Hall and Edwards have any claim against your half?

Mr. ARCHER: I object. That calls for a conclusion of law upon the effect of the language in the contract.

A. I contend, as I have stated, that Mr. Robertson has no claim against me at all; that if his claim is sustained on the ground that he was interested in the Maish-Gordon contract then the obligation to pay Gwydir, Hall and Edwards will fall upon him.  
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By Mr. PATRICK:

Q. Suppose the claim should be sustained on the ground that the compensation due to Gordon, to Robertson, and to all the others, to whom any award is made, is not under the Maish-Gordon contract, but because of the valuable services rendered by them to the Indians, then upon whom would fall the burden of paying Gwydir, Hall and Edwards?

Mr. ARCHER: I object to that for the same reason, and for the additional reason that it is a speculation.

By Mr. PATRICK:

Q. I will add, "Under your interpretation of the contract and your understanding of what you intend to do." A. If my agreement with Robertson is declared not to be under the new contract, then the obligation to pay Gwydir, Hall and Edwards will fall upon Robertson, because it is a prior agreement.

Q. One of them is not a lawyer, is he? A. Not to my knowledge.

Q. And the proviso added in your handwriting to the agreement between Robertson and yourself, "after settling with other attorneys under contracts heretofore made by said Gordon?" A. I meant by that all other parties—all previous obligations.

Q. The agreement reads:

"The fees to be divided between said Robertson and said Gordon as herein provided shall be the net sum accruing to said Gordon, after settling with other attorneys under contracts heretofore made by said Gordon."

Now, under that agreement it was stipulated, was it not, 252 that whatever deduction was made should be from your money? A. From what?

Q. That whatever deduction was made for payments to other attorneys as specified there should be all from your money, and now you say that this particular sum should be from Robertson's money. Why? A. There was never any stipulation that it should be from my money. There is no such stipulation there. It is from the total amount, the total of all of it.

Mr. PATRICK: Read the question.

(The question was read by the stenographer as above recorded.)

By Mr. PATRICK:

Q. But suppose the award being to you, it was all your money until somebody else got some of it. They might have claims against you, but it was your money while you had it? A. Certainly.

Q. Therefore, the deduction would all be from your money; would it not? A. Not at all. It would be from the \$14000; but if the Court would give Robertson an interest in that \$14000, of course before any division of that \$14000 with Robertson the deductions would have to be made from that sum that the sum was bound for, and Robertson would have to pay such part as he was bound for.

MR. ARCHER: I move to strike out the answer, for the reason that the agreement refers to an interest before the award of \$60000 had been made. So as not to have to repeat my motion, I move  
253 to strike out all answers to questions that have been made by the witness over my objections.

By Mr. PATRICK:

Q. Are you conceding or opposing Gwydir's claim in this case? A. I am opposing it for the ground stated.

Q. It does not make any difference on what ground. Are you conceding or opposing Henderson's claim? A. Henderson is making no claim.

Q. Are you conceding or opposing Henderson's claim, which is alleged to have been transferred to the Indian Protective Association? A. Most assuredly.

Q. What? A. I certainly am.

Q. Was Henderson paid the \$5000 awarded to him by the Court of Claims? A. You will have to ask Mr. Henderson.

Q. Was May paid the \$3000 awarded to him? A. You will have to ask Mr. May.

Q. Don't you know as a matter of fact, and from inquiry at the Department also, and from the records of the Court, that those sums have been paid to them? A. I understand that May and Henderson have been paid?

Q. Also Butler & Vale's award? A. Yes.

Q. Is the claim asserted by the assignee of Henderson in this case, of \$5000 and was the claim asserted by the assignee of May, of \$3000 the same claim upon which they were awarded the 254 judgment in the Court of Claims? A. I presume so; I know nothing to the contrary.

Q. They only had the one contract and the one employment by you; you had only the one contract with each of them; had you? A. Only one contract with both—a joint contract.

Q. Well, either way. What I am seeking to establish is that the claims sued on in your suit are the same identical claims for which they have been paid out of the Treasury. That is a fact, is it not? A. That is my understanding.

Q. And you have not set up, have you, any opposition to those claims that they have already been paid or made any demand that they should first pay into the Court what they have received before

they shall demand payment out of this fund? A. May and Henderson who received the fund are not suing. It is the Indian Protective Association. They have not received directly, to my knowledge, from the Government any award.

Q. But May and Henderson's assignees are suing to be paid out of this fund; are they not? A. Yes sir.

Q. And May and Henderson have been paid direct from the Treasury, the same claims? A. May and Henderson have been paid the amount awarded them by the Court of Claims, and the Indian Protective Association is suing as assignee under the contract originally made with May and Henderson.

(It is stipulated by and between counsel that wherever the word "assignment" is used, "alleged assignment" is meant.)

255 By Mr. PATRICK:

Q. Be kind enough to look at the following paper, which is found in the file without any file mark upon it, and state what it is (handing paper to witness). A. (after examination): It is a certificate from the Secretary of State of Delaware, under date of October 10, 1908, that a true copy of the proclamation of the Governor of the State of Delaware forfeiting the charter of the State of Delaware, is incorporated therein.

Mr. ARCHER: I ask that that be marked as an Exhibit in this case.

The paper referred to was received in evidence and filed herewith, marked, "Complainant's Exhibit No. 9." It is in the words and figures following, to wit:

"State of Delaware.

Office of Secretary of State.

I, Joseph L. Cahall, Secretary of State of the State of Delaware, do hereby certify that the following is a true and correct copy of the proclamation of the Governor forfeiting the Charter of "The Indian Protective Association":

*Proclamation.*

State of Delaware.

Executive Department.

Whereas, Thomas N. Rawlins, State Treasurer of the State of Delaware, has reported to me a list of Corporations which for two years preceding such report, have failed to pay the taxes assessed against them and due by them under the laws of this State;

Now, therefore, I, Preston Lea, do hereby issue this Proclamation according to the provisions of Sections 10 and 11, Chapter 15, Volume 22, Laws of Delaware, entitled "An Act

to Raise Revenue for the State by taxing certain corporations," and do hereby declare under this Act of the legislature that the Charter of the following corporation, reported as aforesaid, is repealed:

The Indian Protective Association.

In testimony whereof, I, Preston Lea, Governor of the State of Delaware, have hereunto set my hand and caused the Great Seal of this State to be hereunto affixed this 21st day of January, in the year of our Lord one thousand nine hundred and seven and of the Independence of the United States of America, the one hundred and thirty-first.

By the Governor:

[GREAT SEAL.]

PRESTON LEA.

JOSEPH L. CAHALL,  
*Secretary of State.*"

And I do further certify that the aforesaid corporation is no longer a corporation in good standing under the laws of the State of Delaware.

In testimony whereof, I have hereunto set my hand and official seal at Dover, this tenth day of October, in the year of our Lord one thousand nine hundred and eight.

[SEAL.]

JOSEPH L. CAHALL.

*Secretary of State.*"

257 By Mr. PATRICK:

Q. Have you set up as a part of your defense against the Indian Protective Association that it is not a corporation and not entitled to sue in this case? A. I think that contention was made.

Q. Don't you know from inquiry at the Department or otherwise, that the Department of the Interior refused to permit any new contract to be made with the Colville Indians, that the alleged McDonald contract with them was not approved? A. I understand that the alleged McDonald contract was not approved, but have no personal knowledge that the Department has refused to allow any contract.

Q. Didn't you know that at that date, while the bill was pending before Congress, it was impossible to secure any new contract with the Indians? A. Which bill?

Q. The bill that became law—the appropriation bill, of 1903. A. I did not know that until long afterwards.

Q. Do you think it would have been physically possible to have obtained any contract from the Indians—any official contract from them?

(There was no response to this question.)

By Mr. ROBERTSON:

Q. You were informed by a letter that is in evidence that McLaughlin was negotiating a treaty with the Indians, and that in that treaty he had agreed to recommend the payment, on behalf of

the Interior Department, of \$1,500,000 to these Indians.  
258 Q. You knew that? A. I did not know that before the case was on file before the Court of Claims.

Q. You had been written to that there was a representative of the Interior Department out there and that Major Gwydir had been down there representing the Indians? A. I don't recall any information given me that Major Gwydir had prevented the approval of the McDonald contract.

Q. You have read these letters attached to the deposition of F. C. Robertson, have you? A. Yes sir.

Q. Those are the letters that you recognize as having been part of the correspondence in this case? A. Yes sir.

Q. Now didn't you know when you came here that the Interior Department was taking the position that the Interior Department had brought about this relief of the Indians and that the attorneys were not entitled to anything? A. I knew that—at what time, do you mean?

Q. Well, during the time that you were here, prior to the time Mr. Nuzum and Mr. Robertson left? A. I knew that the then Commissioner was antagonistic to any recognition of attorneys.

Q. Now then, if you knew that you knew from your letters that every Commissioner had been antagonistic after Hoke Smith left the Department; didn't you? A. No.

Q. You had written Major Gwydir that Butler had claimed he could not get the permission of the Secretary of the Interior 259 to have a renewal of the contract? A. Yes.

Q. You knew then that a renewal of the contract was practically impossible? A. I did not know that. I did not know, but what, if a contract could be secured without previous consent to go on the reservation, that it might possibly be approved, if it was a legitimate contract. The McDonald contract was rejected, as I understand it, on account of its fraud.

Q. You knew at the time you were here that the Indians had been promised \$1,500,000; that is, had been promised the assistance of the Interior Department to obtain it after that concession had been given to the Indians; didn't you? A. I did not know that until the case was on trial in the Court of Claims.

Q. Didn't you ever meet Mr. Leupp while you were here? A. I never did.

Q. Did you not know that officers of the Interior Department were going before the Conference Committee daily, urging the appropriation to the Indians and cutting the Attorneys' fees? A. I don't recall that detail.

Q. Don't you know that the McDonald contract being in question as to whether it was fraudulent or not, and having been signed by some officials, and with these attorneys urging that contract before the Conference Committee and before the Department and you further knowing that this legislation was practically ended, did you not know at all times that there was no contemplation on the part of anybody in any of those conferences that anybody should go back

260 to Washington and attempt to renew the contract with the Indians? — I knew that after the facts were brought out, but not at the time of the execution of the contract of March 28, 1903.

Q. So that was simply a secret understanding of yours — A. There was no secret understanding at all.

Q. Did you ever tell Marion Butler anything about that contract at all? A. Which contract?

Q. The contract of March 28th. Did you ever tell him there was a contract existing between you and F. C. Robertson to divide the fees? A. I told him that after this concession was under contemplation.

Q. Why did you tell him that? A. Because that was the time when I was making the concessions which I had therefore denied.

Q. Then you told him of that March 28th contract? Was that the first time you told him? A. I don't think I ever mentioned the contract to him until his demands were made, and it became apparent or it was claimed that it was necessary to make concessions in order to secure any fee.

Q. Then you told him of the contract of March 28th? A. I don't remember what time I told him.

Q. But that is the contract you are testifying to, concerning the conversation with Butler? A. I said I don't remember the conversation with Butler as to any particular time. I presume that I did mention that contract to Butler at some interview. I don't remember the date.

Q. What did you say to him about it? A. I don't recall 261 any conversation.

Q. Did you tell him it was a valid and existing contract? A. I don't recall any statement made to Butler about the contract at all.

Q. Did you ever tell Mr. Butler at any time that the compensation I was to receive was only to arise after I should secure a new contract? A. I think I said that repeatedly up to the time that the concession was made.

Q. Then you abandoned that contention for the purpose of that settlement? A. I abandoned that contention solely with the understanding that my concession to you and to Butler would secure a direct appropriation.

Q. What concession? Do you mean to say, Major Gordon, that you and I were disputing, in the presence of Mr. Butler, as to our respective relations? A. No; but you were claiming that that contract gave you rights under the Maish-Gordon contract, and I claimed that your contract related exclusively to the condition precedent of your securing a new contract, and took no other position until the concession was contemplated.

Q. That dispute as to what the contract meant occurred in the presence of Mr. Butler? A. I did not state that.

Q. Well, what did you tell Butler about that particular contract of March 28th? A. I don't recall any special conversation about it;

262 but I know I took the position all along with everybody with whom I discussed it.

Mr. ROBERTSON: I object to that it is not responsive.

By Mr. ROBERTSON:

Q. Did you say anything to Butler about it? A. I don't recall any specific statement to Butler about it, but I did state to everyone with whom—

Mr. ROBERTSON (Interrupting): I object now. Don't go and make an argument.

By Mr. ROBERTSON:

Q. Did you ever tell Butler that you and I were partners in that fee, or not? A. I told Mr. Butler that I resisted your right to any interest under that contract, except on condition of your procuring a new contract.

Q. When did you say that to Butler, and where? A. I don't recall as I have already stated.

Q. Did you say it to Vail, too? A. I don't know.

Q. You don't know whether you said it to Butler then or not, do you? A. I have stated that I am not positive about making that statement; but my impression is that I did to everyone to whom I spoke about it.

Q. Why is it not a fact, Major Gordon, that at the time I left, you and I were in close association, fighting Butler and every one else to protect the interests that we had contended we had by reason of our services? A. After determining on a compromise, it is true.

Mr. ROBERTSON: That is all.

## 263 Redirect examination.

By Mr. ARCHER:

Q. In your direct examination you stated that the agent made a demand upon us. Upon whom did the agent make a demand? A. Gwydir wrote to me—

Q. (Interrupting): You need not tell us what he wrote to you. Did the agent make a demand of you personally? A. No.

Q. What is your source of information? A. It was in one of the letters filed by May, written by Gwydir to Maish and Gordon.

Q. Were you ever on the reservation? A. I was not.

Q. Who was in charge of that branch of the case? A. Gwydir.

Q. Do you know as a matter of fact that an Indian agent ever was offered anything? A. Not to my personal knowledge.

Q. What is your source of information about that? A. Letters from Gwydir. I did not know that the Indian agent on the reservation at the time we were attempting to secure a new contract was ever offered anything.

Q. You were asked what contract had you more than Mr. Robertson, with the Indians, after the expiration of the Maish-Gordon contract. I will ask you what, if any, more claim than Mr. Robertson had you upon the Indians at that time?

Mr. ROBERTSON: That is argumentative and not proper redirect examination.

A. I had the greater claim of having spent twelve years in the prosecution of the claim of the Indians.

264 MR. ROBERTSON: I move to strike it out on the ground that it is a conclusion—that he spent twelve years in that service with the Indians is conclusive that he did not.

By Mr. ARCHER:

Q. Referring to the examination as to the \$150 that was given you to go to Washington, I will ask you what was done when you got here? A. I came here as stated for the purpose of preventing the—

MR. ROBERTSON (interrupting): I object to that question on the ground that it is a manifest argument, pure and simple.

By Mr. ARCHER:

Q. What did you do? I don't care what the purpose was what did you do when you got here? A. I have already testified that the—

Q. (Interrupting.) You testified about your purpose, but I want what you did. A. The principal work we engaged in after my arrival here was contesting the claims of Butler & Vale.

Q. What, if anything, was done with reference to preventing the McDonald contract from being approved? A. I don't remember that we did anything. I think we ascertained soon after our arrival here that it had not been approved, that it was fraudulent and had never been presented to the Department.

Q. What, if anything, was done in reference to getting the new contract when you got the \$150 and came to Washington? A. Nothing was done except to ascertain whether the coast would be 265 clear for a new contract.

MR. ROBERTSON: I object to that on the ground that it is purely an argument—"to ascertain whether the coast would be clear."

By Mr. ARCHER:

Q. What, if anything was done in the direction of or preparing or sending out a draft or drafts or materials for a new contract at that time? A. Nothing was done at that time. All of that had been done before I came to Washington.

Q. What, if any, information did Mr. Robertson give you prior to the signing of the contract of March 28, 1906, relative to the status of the Indian claim? A. I don't recall any information in reference to the status. Mr. Robertson and I immediately proceeded to discuss and negotiate the agreement of March 28th. That was the first thing, and, as I recollect it, the only thing done at that time.

Q. What, if any, award was made to you for services rendered by Gwydir? A. None. The award to me was for my individual services only.

MR. ARCHER: That is all.

## Recross-examination.

By Mr. ROBERTSON:

Q. The contracts you talk about having been prepared were the contracts sent out in 1904; were they not? A. I think so.  
266 Q. You had not prepared any new contracts at any time subsequent to 1904; had you? A. No. The contract sent out was a model, was a copy of the old Maish-Gordon contract.

Mr. ARCHER: He means, was that sent in 1904?

A. From which the new contract was to be drawn.

By Mr. ROBERTSON:

Q. You knew, Major Gordon, that a new contract unapproved by the Secretary of the Interior was worse than no contract, did you not, on the ground that it antagonized the Department against you? A. I knew it would be invalid unless approved.

Q. You knew it could not be approved every minute, even before you started from Florida? A. I don't know that at all.

Q. You came here for the purpose of preventing the approval of the McDonald contract? A. Because it was fraudulent.

Q. That information that it was fraudulent or not—was that information to you at that time? A. It was stated by you in a letter.

Q. That letter stated that that was the first information that was received that some of the Indians were drunk? A. Yes.

Q. Why did you not go to the Interior Department in regard to that contract, yourself? A. I understood shortly after my arrival here that that contract had never been presented for approval.

Mr. ARCHER: I think that is the close of our case.

267 Mr. ROBERTSON: I move to strike out all the testimony of Major Hugh H. Gordon, with reference to any colloquium occurring either before or after or at the time the contract of March 28th, 1906, and all oral testimony offered in any wise tending to alter or vary it, on the ground that the contract is plain unequivocal, unambiguous in its construction and can be undertaken by the Court, with the contract in view and without regard to oral evidence.

(The further taking of these depositions was thereupon adjourned until Monday May 24, 1909, at 1:30 o'clock P. M.)

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## EXHIBIT "B."

KIRKWOOD, GA., Aug. 24th, 1903.

MY DEAR GWYDIR: Yours of 18th inst. has just reached me. Am very glad that my letter reached you & am especially glad to know that you think we can secure an extension of our contracts—It seems to me you had better strike for at least *five* (5) years' extension.

It is very strange that none of the letters which you say you wrote ever reached me. Where did you address them? It seems strange that they were not forwarded to me.

In regard to the fee for the Agent, I think you had better offer

him any where from \$1000.00 to \$2500.00 to be paid out of the proceeds of the fee when the claim is collected. Make the best terms you can; but if necessary to secure his active cooperation you can offer him \$2000, or \$2500.00. You will know how much we offered the former Agent & can be guided in a measure by that—but I should think \$1500.00 to \$2500.00 ought to be enough—He will be on the ground & will have little or no expense; *but don't fail to get him.*

As a special inducement to the Indians to give a new contract, you can say to them that we have secured the consent of General Jno. B. Gordon former U. S. Senator & Ex-Governor of Georgia & Commander-in-Chief of the United Confederate Veterans, to 269 become the Counsel to press this claim. You can tell them to make the new contract in the name of Gen'l J. B. Gordon. You might tell them that General Gordon was not only Governor of a great State & United States Senator; but that in the great war between the North & South he was a great war Chief & is now universally honored & loved in all parts of the Country &c. &c.—You will know how to ring the changes on these facts—And as every word of it is literally true: you can truthfully tell them that General Gordon is the best man in the United States to push the claim—Of course if you can get the new contract for *ten* (10) years, it will be that much better. You can tell those Chiefs & head men that soon after Col. Maish & I began work pushing the claim & the president of the United States made me a Major in the Army to fight the Spaniards & sent me to Cuba with General Fitz-Hugh Lee—that while I was in the Army Col. Maish died & these two things caused the delay in getting the claim through.

By the way there is another matter about which I want to put you on your guard. I am not sure of it: but I suspect Ex-Senator Marion Butler—a Republican from North Carolina—of trying to block us in Washington & I believe he hopes to prevent our winning under our present contract & stave off any action until it expires & then try to get the contract for *himself* from the Colville Indians—He made a contract with some of our associates in Washington & agreed to give faithful service. But he soon afterward made such demands on me for additional concessions which were so exorbitant,

that they amounted to actual blackmail. His attitude was 270 such that we became convinced that instead of helping he was actually blocking the progress of our work. If you find there is any danger of his attempting to secure this Contract, you can block it by telling the Indians that he will not do *at all*—that friends of their claim believe he tried to block the claim in order to let the contract expire & then try to get it for himself.

If you think you could influence the Indians more easily by making the Contract in Father's name above, you might do *that*. This would give us a clean new sheet & we could then make new deals—We could take care of those who had actually given us honest faithful service & let the others go.

You might tell the Indian Chiefs that friends of their claim had

decided that the best man in the United States to push their claim was General Gordon for the reasons I have already stated.

Write me at once what you think of this suggestion. We will have written agreements which will secure to you *to you* and *your* personal friends all the rights that you had under the former contract.

As we will probably fail to get the claim through under the present contract, all agreements made under the first contract will expire; but we will want to deal liberally with those who really did us good service & we will take care of such of your friends as you may wish us to provide for.

At any rate I now give you this written assurance that your interests will be safe under the new Contract if made with General Gordon alone.

271 Let me know by return mail what you think as to the advisability of making the new Contract with General Gordon alone. I am personally inclined to think this plan a good one. The Indians may be more inclined to make a *new deal* than to renew the old one—& you can make such a strong talk about General Gordon's prominent position, & reputation, influence popularity &c. that I believe you can get the new Contract in his name for ten (10) years.

If we had a Democratic Administration we might possibly do some thing for you in the matter of the Chinese Inspectorship; but if the Civil Service Commission confess that they are powerless, I fear we could not accomplish anything now.

Father has read your letter to me & tells me to give you his cordial regards & thank you for your very complimentary expression about him.

If you have already seen the Agent & talked to him on the line of a renewal of the old contract, you had better write him at once & tell him you have since seeing him made a big stroke by securing General Gordon's consent to become Chief Counsel of the Indians & that instead of renewing the old contract the plan will be to make a new deal & a new contract with Gen'l Gordon alone.

I will in mean time take steps to prepare the necessary papers for the new deal. Write me promptly. With best wishes.

Yours, Faithfully,

HUGH H. GORDON.

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### EXHIBIT "C."

BISCAYNE, FLA., Feb'y 2nd, 1904.

MY DEAR GWYDIN: I have just received your letter announcing the fact that parties are out there trying to buy up all the claims of the Colville Indians, and asking me what it means—I have sent you to-night the following telegram:

"Prevent sale of claims—Buyers are not our friends—I write"—This telegram I now confirm. No friends of ours are attempting to buy those claims, and I trust you will at once have a conference with the Indian Agent & other influential friends & defeat this effort—It means that these parties are trying to buy out those claims & pay

the Indians a mere trifle & then collect & pocket the bulk of the money—leaving the Indians in the lurch—Have the Agent warn the Indians against this effort to rob them. Let him assure the Indians that you will have some of the strongest & ablest Attorneys in the United States to take charge of & collect their claims—That all you & your friends ask is 15 per cent commission, which would leave the Indians over (\$1,250,000.) one & a quarter million dollars, even if no interest was collected—

Tell the Agent in *strict confidence*, that you hope to secure Hon. Hoke Smith, who was Secretary of the Interior under President Cleveland—a Member of President Cleveland's Cabinet—Hon. Hoke Smith has now the matter under consideration—I hope he will accept the Attorneyship; but if circumstances prevent his doing  
273 so, you can assure the Agent that Lawyers of the highest character & ability will be secured—Men who will deal fairly & honorably with the Indians—men who will honestly & earnestly work for the interest of the Indians & who will collect the money & have it paid to the Indians & not try to rob them.

I don't believe any one will pay the Indians any large sum in *cash*. These buyers will try to get the claims for some insignificant sum, or try to bribe the Indians to give them the contract—By a skillful presentation of the facts stated in the preceding paragraph I believe you can block the game of these parties.

As I have written you several times, I suspect D. B. Henderson of this trick—as heretofore stated, I may do him injustice; but the outrageous way in which he acted in refusing to send me my contracts & other papers & even after I had sent my cousin, in Washington to get them, holding on to them until he could make copies of them, makes me fear some treachery on his part. Possibly Senator Butler of N. C. may be behind this movement to buy up the claims—Both Butler & Henderson had been employed to push the collection of these claims under the Maish & Gordon Contract & if you find they have anything to do with this effort to beat us, you ought to have the Agent expose them & charge that they have deliberately allowed the claims to go by default, under our contract in order that they might secure a contract for themselves. However they will hardly come to this point in it, even if they had inspired this scheme.

I wrote you several times asking you to let me know whether you thought it best to try to close with the Indians this winter or wait till

Spring. You have never answered this question & I concluded you had decided it was best to wait till Spring. If  
274 Henderson had not served me such a dirty trick & had sent my papers when I first wrote for them, I could have had the papers out there to you in time to get into the reservation & secure the new contracts before the snows began. But there is no use crying over spilt milk. I did the best I could & if I had dreamed that Henderson intended to serve me such an ugly deal, I would — gone to Washington myself & gotten the papers, but he led me to believe he would send them right along & when I would write him, he would make some excuse for delay & promise again & again fail & so it went for months until I finally sent my cousin to his office & got them after several days more of delay.

Now my dear Gwydir, for Heeven's sake, don't let us "fall down" in our effort to get the New Contract—I will try & close matters with Hoke Smith at once without waiting for the spring to open & will send you the papers at earliest day possible. In mean time see the Agent & if necessary, *double* his fee—If you save that contract for us, I will see to it that your own fee is increased—

While waiting on the papers, KILL that *buying scheme* & *block these schemers*—Then pave the way for the new contract—Don't promise positively that you will have Hoke Smith—You can say however that he is considering it & that even if he can not take the Attorneyship himself, we believe we will secure his aid.

I am banking on your holding things in shape at that end of the line.

Faithfully yours,

HUGH H. GORDON.

Mr. R. D. Gwydir, Spokane, Wash.

[On left margin:] Be careful & don't let Hoke Smith's name get in the newspapers. Don't mention him to any one not directly interested or needed to help you.

[On right margin:] I shall be sick with anxiety until I hear from you.

275

#### EXHIBIT "D."

BISCAYNE, FLA., April 16th, 1904.

MY DEAR GWYDIR: It looks there is treachery in Washington—After receiving your last telegram day before yesterday, I wired Butler & Vale to know why they had not forwarded the papers—Up to the present hour I have received no answer to this telegram—Since leaving Washington I have written two urgent letters emphasizing the importance of getting off the papers to you at once & asking them to let me know whether they had already gone—To neither of these letters did I receive any reply—In fact I have not had a line from either Butler or Vale since I left Washington. The fact that they have completely ignored both my letters & telegram convinces me that we are being betrayed—

It looks as if it was their purpose to hold those papers in Washington & refuse or fail to send them to you—They evidently hope to break you down—& destroy your influence with the Indians if they can possibly do so, & then come in & secure the contract for themselves. The mere thought of such a thing makes me sick with indignation; yet I can see no other explanation of their conduct.

I made a contract with them in absolute good faith by which I was to try to secure a Contract for them with the Indians & they on their part were to undertake the prosecution of the claim in Wash-

ington—They both promised faithfully to get the papers off 276 at earliest moment possible & claimed that the only delay

would be for the purpose of getting a letter from the Indian office authorizing them to go or send into the Reservation to secure a contract with the Indians—Vale told me he thought he could see the

Indian Commissioner the next day & both promised that there should not be an hour's unnecessary delay—As a matter of course they can make all sorts of excuses for the delay but there is no just reason that could be assigned for their failure to answer my letters or telegram; and I can conceive of no other explanation except that they think that by holding those contracts, they can bottle us up & break you down.

Now my dear Gwydir, I can see only *one* possible way to save ourselves from falling into this trap—I know that you are an honorable man & that I can trust you implicitly—Here is my program:—You to consult with the Indian Agent at once & explain that the drafts of the proposed contracts with the Indians are being delayed in Washington, & that *it is the wish* of your friends & associates that *you* should take a contract or rather secure a power of Att'y from the Indians, making you their fiscal Agent with power to *select* the best & most available attorneys & execute with such attorneys a new contract on the same basis as the one made with Maish & Gordon—I do not mean that you should make a contract in your own name; but that you have the council of each tribe pass a resolution appointing you as their Agent to make the contract with the attorneys—

Upon reflection I believe that, everything considered, the quickest & safest plan is to take the *the* new contract *yourself* in the  
277 name of "*R. D. Gwydir & Associates*" You & I will under-

stand that our respective interests are to be the same as if we had gone on *on* the other program & gotten the contract for Butler & Vale—We can still make them our Washington Counsel if we find there *has been no treachery*. You can explain to the Agent & to the Indians that owing to the delay in getting the new papers forwarded from Washington, you & some of your associates think it best to go ahead & take the new contract in name of R. D. Gwydir & Associates & that the attorneys selected will be the best & most available lawyers in Washington & that they will be included in the term Associates. The Indians know you & those people who have influence with them know you & trust you & would probably feel safer & better satisfied when they know that *you* had the matter in charge—

It will perhaps be wiser not to mention to any one that we have any doubts as to the loyalty of the Washington lawyers who were to forward the new papers—Simply say that you & some of your Associates cannot understand the failure of the new contracts to arrive—(This is literally true—we don't understand it)—and that for fear the papers have miscarried or something unfor-seen is causing delay, it has been decided that it is best for you to take the new contract yourself in name of R. D. Gwydir & Associates—Treat the failure of the new contracts to arrive as a matter of no serious importance, but that to save time your associates think it best that you should take the contract as above indicated—I think a good stroke of diplomacy would be to have the Indian Agent, or who ever is closest to the Indians & has most influence with them, suggest to them that

278 the wisest & safest thing in this new contract matter, is to have Gwydir, the man who is their friend & whom they know & trust be one of the parties in the Contract & that Gwydir can select

as his associates some of the best attorneys in Washington. I suggest that you take no one into your confidence except those upon whom you can rely implicitly & see to it that they say nothing of the program except to the leading Indians who are known to favor what you wish—You see if those fellows in Washington are really playing us *false*, they will think they have my hands tied & will rest quietly & wait for the present contract to expire—They may however pigeon-hole the papers which we prepared while I was in Washington and may try now to get a contract for themselves or some one representing them—if on the other hand, they are not betraying us & are honest in their intentions, we can still carry out our agreement with them & your taking the new contract in name of "R. D. Gwydir & Associates" will in no way interfere with the carrying out of the original program. Now as to the quickest & best way to carry out the plan above outlined—The Indians have a copy of the Maish & Gordon Contract—The Indian Agent can secure that contract in order to make a copy of it leaving all dates blank & all names blank in the various certificates at end of contract & substituting in body of contract the name "R. D. Gwydir & Associates" in place of the names of Maish & Gordon. My copy of the Maish & Gordon contract is in Washington in office of Major Holmes Conrad—if I had them here I would have them copied & changed to suit the new program & send them to you; but it would take several days even if

279 I telegraphed for them to be sent here—Perhaps it would be wisest to have you do the changing of the papers there, as there might be conditions & circumstances which I could not fore-see—For fear you may have some trouble in getting hold of the copy of the Maish & Gordon Contract now in hands of the Indians, I think I will wire Major Conrad to send the copy in his office out to you at once—Let one clause in the new Contract state that: "This Contract is to go into effect immediately upon expiration of the time limit fixed in contract heretofore made with Maish & Gordon."

The lawyers with whom I conferred while in Washington were of the opinion that the securing of the signatures of all the male Indians above 18 years of age & of all widows, was an entirely unnecessary & troublesome task—They said that the almost universal custom was to have the Indians call a *council*—Have the council called in the manner usually adopted in accordance with the customs of the tribe—At that council the proposed contract must be read to them & interpreted so that they clearly understand all its provisions & then have the council pass a resolution approving the contract & appointing one of their Tribe to act as their authorized Agent & attorney to execute the contract for them—in this power of attorney which will have the effect of a resolution, you can follow the model in the old contract by simply copying it & leaving blank the name of the Indian who is to act as their Agent and Attorney, and have this power of Attorney signed by all the members of the council of each tribe, instead of all the male members & widows—

280 This will save you a lot of time & trouble—if however all or a majority of grown male Indians & widows are easily accessible, you might secure their signatures as you did before;

but upon this point you had best use your own judgment—The Washington Lawyers however assert most positively that this is unnecessary—that the action of the council regularly called, is all that is necessary—The Indian Agent & the Interpreter must however both give certificates that the contract was read interpreted & explained to them fully & clearly before the signing &c. (See models in old contract)—

In other words, you follow the model of the old contract, making the slight modifications necessary to meet the new conditions.

Like you I am hard pressed for money. The drought & frost have cut down my crops until I fear I shall make serious loss on the year's transactions—But as soon as I can get N. Y. Exchange from Miami, I will send you a small check to help pay expenses. Possibly I may be able to send you more later on—

I can see no other plan, my dear Gwydir by which we can protect ourselves. The one above set forth presents to my mind our only hope—Write me immediately upon receipt of this & let me know if you think you can carry this plan into execution.

I have absolute faith in you & I wish you early & prompt success—

Faithfully yours,

HUGH H. GORDON.

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EXHIBIT "E."

*Telegram.*

The Western Union Telegraph Company.

Received at 279.

10 Paid. Night.

169 PO G. BU.

MIAMI, FLA., 27-28th, 1904.

R. D. Gwydir, 1804 College Ave., Spokane, Wash.:

Delay unavoidable hold everything steady doing my best letter explains.

HUGH H. GORDON.

1235 a. m., 28th.

EXHIBIT F.

*Telegram.*

The Western Union Telegraph Company.

Received at 345.

10 Paid. Night.

RED. 115-CH-WV-E.

MIAMI, FLA., April 19, 1904.

R. D. Gwydir, care Office Sup't of Streets, Spokane, Wash.:

Wrote Sunday Solution all difficulties Hold steady till letter comes.

HUGH H. GORDON.

12.57 a. m., 20th.

## EXHIBIT "G."

BISCAYNE, Fla., April 22nd, 1904.

Mr. R. D. Gwydir, Spokane, Washington.

MY DEAR GWYDIR: You have doubtless, ere this, received my letter explaining the way in which those fellows in Washington have treated me, & outlining the program upon which I have decided, if you can carry it through—I have been so badly treated & badly deceived by those fellows that I am not willing to worry with them any longer, and I want you to take that contract in your own name, or rather in name of R. D. Gwydir & associates—

Butler & Vale promised me most positively to get the contracts off promptly & also promised to see the Indian Comr at once. Yet they never saw the Comr for nearly a month & then got no letter & never forwarded the contracts at all— As I wrote you, it looks like a deliberate effort to break us down— If I had had the remotest idea that they were not dealing with me in good faith, I would never have left Washington until the papers had been forwarded to you— However it is too late to grieve over misplaced confidence, & our only, or rather our best program now, in my judgment is for you to take the contract in name of yourself & associates— If you have some personal friend who is a good

lawyer, you might consult him as to whether it would be  
283 best to take the contract simply in your name alone, or (as  
I have suggested) in name of R. D. Gwydir & associates—

I have just received a letter from Butler making excuses for not sending on the contracts, and admitting that he & Vale did not go to see the Comr until the 18th— He encloses copies of the contract drawn with R. J. Bright as the contractor— He says he & Vale could not take the contract without the approval of the Secretary as that is a rule of the Department; yet he sends contracts to be taken in Bright's name. If Butler & Vale cannot take the contract without the Secretary's permission, how can Bright take it? The whole thing looks like a farce— Furthermore Butler knows that I have no contract with Bright, like the one I made with him (Butler) & Vale, & he is crazy if he thinks I would have you take the contract in Bright's name & put myself & my friends completely in Bright's power—

What we will do is to take the contract in name of R. D. Gwydir & Associates, following the forms which I enclose— Then we will *quietly pigeon hole the contract* until there is a change of administration or at least a change of Secretary of Interior— When a new man comes in as Secretary, I believe we can get the contract approved— We will not attempt to get it approved by the present Secretary or Commissioner—

Fearing you might have some difficulty or experience delay in getting the copy of Maish & Gordon Contract belonging to the Indians, I have thought it wiser to forward to you the forms which

284 Butler sent to me— These forms are practically copies of the Contract with Maish & Gordon— I have just telegraphed you that I was forwarding forms for contract suggested in letter— Now my dear Gwydir, note carefully the following:

1st. You will want at least two (2) *original* or ribbon copies of the contract, including all the certificates of the Interpreter, Indian Agent, Judge, &c. One of these, with the other papers goes to the Indians & the other goes to the Department in Washington to be filed there. You had best have four originals & let each typewriter make *three* carbon copies. This will give 14 copies of the contract. The carbon copies are to be drawn without the certificates.

2nd. You will need 12 copies of the Power of Att'y, each of the six tribes or bands must execute the Power of Attorney in *duplicate* & each power of Att'y requires a copy of the contract. The Powers of Attorney are very short in themselves but each of them as you will see requires a copy of the contract & each requires the certificates which you see attached to the Power of Att'y.

I enclose a copy of the contract which I have changed so as to have your name " & associates" inserted; & I send also the form for the Power of Att'y which we used before. If you decide to have the individual Indians sign it as you did the first time, you will follow this form verbatim: If however you decide to have the Indians call a meeting of the Council, then the phraseology should be changed in the first paragraph & leave out the sentence about "constituting a majority of male members."

In drawing the powers of Att'y, leave blank spaces for inserting the name of the Indian who is to act as Agent for his tribe 285 or band.

I hope you will be able to read this: I am sick & nervous & can scarcely write.

Trusting you will be able to promptly carry out the program submitted & thanking you for your loyalty and patience I am Faithfully yours

HUGH H. GORDON.

BISCAYNE, FLA., Dec. 18th, '05.

Mr. R. D. Gwydir, Spokane, Wash.

My DEAR Gwydir: Your letter of the 6th has just reached me. It must have been in some way delayed in transit. I am very glad to hear from you & to know that you have matters well in hand & are in control of the situation, but disappointed that contract not yet secured.

I note what you say about other parties trying to secure contract with the Indians & hasten to assure you & Mr. Robertson that I am in no way connected with any party or parties attempting to secure that contract, except yourself & Mr. Robertson. I have *never* in my life dealt in bad faith with any one & you may rest assured

that I will take no step affecting our mutual interests without conferring with you & keeping you fully posted.

My place, while on the R. R., is miles away from the nearest telegraph office, & as my telephone is not now working (they are constructing a new line) I write instead of telegraphing you, as you suggest. I would write directly to Mr. Robertson, as your suggest, if you had given me his address; but as I do — know whether he is in Spokane or elsewhere, I send this to you.

In regard to protecting the interests of yourself & Mr. 287 Robertson, you will doubtless remember that I wrote you when we began this new deal that I would not only be willing to make the interest of yourself & associates the same as we did when Maish & I first made our trade with you, but would be willing to increase the interest to (25%) twenty five per cent, so as to give you a big margin for securing all the help you needed—In other words, to you & to those who cooperate with you in securing the contract we will set aside (25%) twenty five per cent, Twenty five per cent (25%) to be set aside for my interest & the remaining (50%) fifty per cent to — reserved for securing the best & most influential Attorneys in Washington to press the claim for us, before Congress & the Court of Claims.

My idea is that you & Mr. Robertson shall use your own judgment as to the distribution of the 25% allotted to you for work at that end of the line. If we are limited to 10% Com'n as it we probably will be, you would have \$37,500.00 at your disposal in case we succeed—By judicious trading, you could probably secure the aid of such parties as you wish to enlist by promising contingent fees of \$1000.00 to \$2000. each, & thus save for yourself & Mr. Robertson the bulk of the \$37,500.00. We will get the contract from the Indians if we can, on a basis of (15%) fifteen per cent commission, just as we did before, & make a fight in Washington to hold the commission at this figure—When the Commissioner of Indian Affairs cut our com'n to 10% under the old contract, I appealed to Hoke Smith who was at that time Secretary of the Interior & convinced him that we were fairly entitled to 15%, & he promised

288 to restore the com'n to that figure but resigned before taking the matter up officially—The same arguments I used with

Hoke Smith could be used with even greater force under this new contract—if we make the 15% stick & I have strong hopes that we may do so, it would give you \$53,250. You might make your deals with the parties whose aid you wish, with the distinct understanding that if the Commission is reduced to 10%, their fees are to be scaled in proportion, or to put it different, you might make the deals on the assumption that we would not be allowed over 10% Com'n & agree that if the Com'n should be allowed to remain at 15% you would increase the fee in proportion—This would be a more attractive way to put it. For example, if you agreed to pay some influential Chief a *contingent* fee of say \$1000. you could tell him that if we got 15% Com'n you would raise his fee to \$1500.00 & make the contract with him in that form.

You will remember that I wrote from Washington (when I went

on there to see about the status) that I had made a deal with Ex-Senator Butler of N. C. & his partner by which I agreed to pay them 50% to prosecute the claim—This 50% was to be used in securing the cooperation of *all* parties who had been interested as Attorneys in the old contract—At that time Butler & his partner agreed that we should take the Contract with the Indians in their name—They afterwards wrote me that they had just ascertained that the Department would not permit them to make a contract with the Indians & they sent me contracts made out in the name of Col. Richard Bright, whom you will recall as the Sergeant at Arms of the Senate when the Democrats had control of the Senate. I of

course refused to use any such contract, as I had no agreement with Col. Bright & I would have been putting our interests completely at the mercy of Bright. It was then that I decided that the best thing for us to do was for you to take the new contract in the name of R. D. Gwydir & Associates.

289 I am strongly inclined to suspect that the statement of Butler & his partner that they would not be allowed by the Int. Dept. to take the Contract in their names was all "tommy-rot" & that they sent me the contract in Col. Bright's name (knowing that I had no agreement with Col. Bright) hoping that I would fall into that trap.

Now as a part of the consideration of my agreement with Butler was that he & his partner should allow the new Contract with the Indians to be taken in their names, & as they declined to carry out this stipulation, it seems to me that my agreement with him falls to the ground & that he has now no claim on me either legal or moral under that agreement—Therefor- when you get the new contract with the Indians & I go on to Washington to look after our interests in the matter of securing influential attorneys to prosecute the claim, it seems to me that my hands will be free to make a new deal & if I can make this new deal & secure competent counsel (including all attorneys interested in the old contract) for less than 50%, then anything I can save in this way, I will share with you & Mr. Robertson—For example, if I can get satisfactory counsel for 40% it would give you & Mr. Robertson & your associates out there an additional 5% & give me an additional 5%.

It may however be best for the sake of peace & to avoid all 290 friction & antagonism, that I should renew the contract which

I made with Butler. We can't afford to make enemies & I would rather give up the 10% & have everybody propitiated & satisfied & all working harmoniously together than to hold back the 10% & make enemies & possibly create positive antagonism—

When your letter was handed me, I hoped it would bring the announcement that you had secured the Contract—You wrote me, a long time ago, that you had everything ready to push the work to conclusion & was only waiting till after the election—What caused the delay? What is the status *now* with regard to *your* getting the contract? You say you have checkmated the other fellow & prevented him from getting the contract; but you don't say what your chances are for securing the contract for us? Do write me full details—

By the way, I have at last secured Father's picture for you & will take great pleasure in sending it to you. With Cordial regards,  
I am—

Faithfully yours,

HUGH H. GORDON.

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EXHIBIT "L"

REYNOLDS, GA., July 9th, 1904.

My DEAR Gwydir: I left Florida several weeks ago—Have been in Atlanta & am now here in Taylor County on our plantation—I wrote fully to Mr. Robertson & explained the situation to him & asked him to show you my letter & let it be an answer to yours also—

I would like to have seen Mr. Robertson; but I was unable to go to the Democratic Convention—

The statement that I have transferred all my interest in the Contract to D. B. Henderson is a deliberate lie—I transferred to May & Henderson several years ago (25%) twenty five per cent in the old contract—This has expired by limitation. Since then I have not assigned to Henderson a dollar's interest in anything—This statement, if inspired by him, is in keeping with his conduct last summer in holding my copies of our Maish & Gordon contract, when I had repeatedly asked him to send them to me. You will remember that I wrote you about it—

In my letter to Mr. Robertson I explained, or intended to explain that my financial straits were such that I would not be able to advance more money; but I made the suggestion for a liberal division of the interests in the contract which I hoped would enable him to unhesitatingly advance the amt needed to pay your expenses in getting a renewal of the contract—

292 I believe Henderson is a bad egg—& will not hesitate at anything to defeat us & secure the contract for himself—

I made a contract with Ex Senator Butler & Mr. Vale; but even that ought to be voided for failure of consideration—But while I am disgusted at what seems to have been the wilful delay of Butler & Vale to send forward the papers; yet it may be policy for us not to break with them—We may have to utilize their services in pressing the claim; when you have secured the new contract—

What is the present status & the outlook—I hope Mr. Robertson will join you & advance the amt necessary to enable you to secure that contract—

Keep me posted—I will be here for a week or more—

Faithfully yours

HUGH H. GORDON.

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## EXHIBIT "J."

The Western Union Telegraph Company,  
Incorporated.

23,000 Offices in America. Cable Service to all the World.  
Robert C. Clowry, President and General Manager.

Received at 618 Riverside Ave., Spokane, Wash.

17—CH—RG—E— 15 Paid.

MIAMI, FLA., *March 17, 1904.*

R. D. Gwydir, care Office Sup't Streets, Spokane, Wash.:

About starting Washington to hurry contract forward Wire here  
quick if outlook reservation still favorable.

HUGH H. GORDON.

8 a. m.

## EXHIBIT "K."

The Western Union Telegraph Company,  
Incorporated.

23,000 Offices in America. Cable Service to all the World.  
Robert C. Clowry, President and General Manager.

Received at 618 Riverside Ave., Spokane, Wash.

3—CH—LZ—E— 10 Paid. 296.

MIAMI, FLA., *April 23, 1904.*

R. D. Gwyder, care Office Sup't of Streets, Spokane, Wash.:

I forward forms for contract suggested in letter. Write me.

HUGH H. GORDON.

6:25 a. m.

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## EXHIBIT "L."

Andrew Lipscomb, Attorney at Law.  
Practices in the Supreme Court of U. S., Court of Claims, and all  
Courts in the District of Columbia and Virginia.

1419 F Street Northwest, Washington, D. C.

Phone, Main 5959-M.

SEPT. 14TH, 1908.

Major R. D. Gwydir, Spokane, Wash.

MY DEAR Gwydir: You doubtless know from my attitude before  
the Court of Claims, that I have always tried to act toward you in  
absolute good faith—I had my contention before that Court been  
sustained & had the whole fee been paid to me as sole surviving  
Att'y of the Indians, I would most assuredly have paid you, in  
spite of technical defects in your claim—but the Court of Claims  
declared the Maish & Gordon contract to be *dead* & treated all sub-  
contracts thereunder as having died with it—for these reasons &

others fully stated to your Counsel here, I cannot feel that you have now any legal or moral claim against me, yet in spite of this your Counsel here has filed suit against me—

While I do not think that this suit is just, I am not writing to quarrel with you about bringing it—We will let the Court decide what is right between us—

My object in writing you now is to ask your aid in another matter—

You will be surprised to learn that Frederick C. Robertson  
295 (with whom you & I made a deal on the proposed *new* con-  
tract with the Colville Indians), is suing me for a part of the  
fee awarded me by the Court of Claims—

Robertson knows (as well as you & I know) that he was brought into the matter by you, solely for the purpose of aiding in securing & working under a *new* contract,—that his employment had nothing whatever to do with the case under the Maish & Gordon contract & that his coming to Washington in the Spring of 1906 (when I met him here) was *solely* for the purpose of preventing the fraudulent contract secured by McDonald, from being approved & to see what could be done to further the plans discussed by you & Robertson & myself—My letters to you, written from Florida after Robertson united with you, will show this; & if I were in Florida I think I could find letters from you to me, written at the same time which would also confirm it—

Robertson has shown bad faith toward both of us, & I want your help in defeating this suit of his which is an outrage—

If you will get those letters from me to you (& copies of the letters written by you to me) which show that all our dealings with Robertson related solely to a *new deal* under a *new* contract with the Indians; & will then in addition prepare a strong affidavit to that affect that you brought him into the case solely to aid in such new deal & that it had no relation whatever to the Maish & Gordon contract, & will send the letters & affidavit to me, I believe I can defeat his suit.

Now, my dear Gwydir, this testimony will not in the re-  
296 motest degree affect your suit against me under the Maish &  
Gordon contract; & yet it will be of great service to me. I will gladly pay any expense of typewriting & notary fee for affidavit, &c., to which you may be subjected.

With best wishes for your success in all your undertakings (except your suit against me) I am.

Cordially your friend,

HUGH H. GORDON.

I want to emphasize the fact that throughout all this long & weary fight before the Court of Claims, I persistently & earnestly fought for your recognition—I did this against the protest of my Attorney, Mr. Lipscomb. In *every* brief filed by me (& I filed 3 or 4) I plead earnestly for your recognition & compensation & as I have above stated, if my legal rights had been recognized & the fee had been paid to *me* (as it should have been), I would have allowed no technicalities to prevent my paying you every dollar that your con-

tract called for—But the Court ignored the terms of the expired Maish & Gordon contract & ignored all subcontracts thereunder & paid each party solely on an *alleged* quantum meruit basis—

Please send the letters *immediately* & the affidavit as soon as you can prepare it—My answer must be filed by Oct. 6th, 1908.

Although my answer must be filed by Oct. 6, I could use the letters & affidavit on the *trial*, a week or more later—Send letters & affidavit as early as possible—

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## EXHIBIT "M."

(Postal Card.)

1316 KENYON ST.,  
WASHINGTON, D. C., May 21, '06.

DEAR GWYDIR: One of the Members of the Conference Committee  
our

wants to see a copy of the original contract—if you & Robertson can n.t. the original which I had sent out to you, select one of the contracts with *one* of the tribes & have Robertson mail it to Butler & Vale, Bond Building, Washington, D. C. Don't mail but *one* of the contracts—

Please ask Robertson to send to me by return mail the receipt given me by him & which he promised to turn over to me—He forgot to do this before leaving Washington—I wrote him about it, but have not heard from him. He has doubtless overlooked it—

Robertson has doubtless told you of the status of matters here.

Yours, &c.,

HUGH H. GORDON.

(Addressed:)

Washington  
May 21  
2-30 P M  
19-06  
D C

Maj. R. D. Gwydir  
Spokane

Washington.

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## EXHIBIT "O."

The undersigned, tribes of Indians, by the individuals hereto signed, and the chiefs and head men of said tribe, for and on their own behalf and on behalf of all of the Indians constituting said tribe, do hereby agree, that they have consented and do consent that the contract hereinbefore made with Levi Maish of Pennsylvania and Hugh H. Gordon, of Georgia, attorneys at law, the said Levi Maish having died heretofore, shall be continued by the said Hugh H. Gordon, and his associates under this supplemental agreement, with all the rights conferred by the said contract entered into by the resident tribes of Indians on the Colville Indian Reservation in the year 1894 with said mentioned attorneys; the said Hugh H. Gordon

on his part to fully carry out the terms and agreements mentioned in said original contract, and the undersigned Indians for themselves and their respective tribes hereby waive the time limit mentioned in said contract; provided, the said Hugh H. Gordon shall with reasonable and proper diligence appear by himself or his associates before the Interior Department of the United States, the Court of Claims and Congress of the United States, and either procure the said moneys mentioned in said original contract, or the sum of One Million Five Hundred Thousand (\$1,500,000.00) Dollars to be given to the said Colville Tribe of Indians, or to be held in trust for their use and benefit, and to be expended for them, or for the improvement of the said Reservation, or for proper improvements thereon under any appropriate action of the Interior Department or the Congress of the United States; and when such appropriation is made then the said contract is deemed to be fully performed, provided the said Hugh H. Gordon, by himself and associates renders efficient and meritorious service in protecting the rights of the said tribes of Indians resident upon the Colville Indian Reservation.

All contracts other than the said original contract mentioned in this Supplemental Memorandum of Agreement, are hereby declared to be invalid and void, and are hereby revoked, and the said Hugh H. Gordon and his associates are hereby declared to be the only legal or proper representatives of said tribes of Indians hereinafter mentioned.

In witness whereof, we have hereunto set our hands and seals on this the — day of December, 1905.

300

**EXHIBIT "P."**

DEPARTMENT OF THE INTERIOR,  
UNITED STATES INDIAN SERVICE,  
MILES P. O., WASH., 12-4, 1905

DEAR ROB: I have been working. Met Major McLaughlin and Capt. Webster. Have killed the Anderson business *dead*.

Have seen all of the Old Chiefs, and met with a warm welcome from them and am satisfied that they will not sign for the new treaty, until the old treaty is settled. I will not be allowed to talk at the Pow Wow, now being held, but have seen the Indians, and have employed two men to impress them with what I have said.

I thought it best not to ask any of them to sign for a new contract as it could not be kept quiet. And did not want to tip my hand to — — — I am doing better than I had any right to expect.

In haste,

Yours,

R. D. GWYDIR.

301

EXHIBIT "Q."

(Mailed) Jan. 16, 1906.

JAN. 8, 1906.

Hon. Hugh H. Gordon, Biscayne, Fla.

DEAR SIR: Myself and associates sent Major Gwider to the Indian conference to see what could be done. You are probably aware of the fact that the Government claims to have secured a supplemental agreement, practically abrogating all other agreements with the Indians. I am informed that one of the purposes of this agreement was to prevent the claim for counsel fees under the old contract. I instructed Maj. Gwider to ascertain if he could sign up a new contract, but owing to the presence of Government officials, and the chance to incur enmity in the Department, he did not do anything. I understood that the old Maish Gordon contract had in some way become blended with the new contract secured with the Indians through former Indian Agent- Anderson and MacDonald, and thinking that you had become restless with us here, I kind of dismissed the matter from my mind. You originally advised us to wait in this Indian matter, and I let it go by, but I feel satisfied now that the Indians could extend the time of this contract now as well as they could before the contract expired. For both would stand or fall independent of the approval of the Department. I probably neglected the securing of the contract, not only on account of your suggestion that I wait, but also on account of the great stress of business.

The situation here is briefly this: Anderson, after he 302 had been dismissed from the Government service, and while

thoroughly discredited, went upon the reservation without permission from the Government, took the Government interpreter, and secured a contract that he had previously prepared, in the name of E. C. Macdonald, now assistant Attorney General. Some of the Indians claim that they were drunk when they signed it, and practically all stand ready to repudiate it. I took the matter up of your contract with Anderson before he went to Macdonald and others, and he undoubtedly played us false, because he made the deal, as near as I can tell, with Judge Gordon of the Great Northern Road here, and the firm of Sullivan, Nuzum & Nuzum, and probably others. Nuzum & Nuzum are from Wisconsin and have some influence there. Judge Gordon was formerly one of our Supreme Court Judges, and is a capable man. I went to Macdonald, and informed

him of my association with you and Major Gwydir, and stated that if he had a proper contract, and would protect us on proper lines, we would endeavor to work together, but I got no favorable response, therefore assume that there is nothing to be accomplished there.

Of course, I recognize that at every stage of the proceedings, that each step I take with you or independently, both you and Major Gwydir were with me in the case. It may be that I could secure an extension of this contract, but it seems to me that it would be a wise thing to attempt to get the approval of the Department for our right to do so, if this can possibly be accomplished.

The treaty that they sought to execute here the last time provided that the money could be expended for the welfare of the Indians, and I do not know whether that would include the right of the Secretary of the Interior to settle with attorneys or not. All of the Indians did not sign the Anderson-Macdonald contract, but I am satisfied that some of the parties attempted to get the Department to approve it, and as you know the ropes in Washington thoroughly, you should have this matter looked into at once, with a view of protecting your interest.

After a most careful examination of the language of the original acts, but without an examination of the law of the two points involved in this matter, I make these suggestions.

1. Does not the agreement with the Indians constitute a valid contract between the Government and these Indians? Was it not accepted by the Government? Did not the Indians by permitting the land to be taken by the Government, or did not the Government as guardian in effect of the Indians appropriate their property to its use, and could not an action be brought on behalf of these Indians, probably in the District Court here, against the Government, for the \$1,500,000 owed them? That is, without passing upon the legal points, if such a procedure could be undertaken, and we could secure an agreement for extension of the contract, and begin this action, it would be a substantial claim against the Government, which in my opinion could be enforced.

I write this letter hurriedly, and without briefing up the law, but cannot the Government be directly sued by an Indian tribe the same as by an individual? If this could be done, then the effect of establishing a legal right which could be paid by an appropriation of Congress, would be substantially to cut everybody else out except you and I, making provision such as is necessary to protect the interest of all of you under the old contract.

2. Would it not be wise to have the matter looked up at once so that the Anderson contract would be knocked out? Would it not also be well for you to say that you had engaged attorneys at this end of the line to collect evidence, showing the reliance of these old Indians on the promise of the Government, and their understanding of the treaty, and that you procured Major Gwydir's assistance, and had never abandoned your contract, and would not your service in the Spanish-American war be dated from the time the contract ought to run.

I suggest these matters to you, and will now act in any way that

you think will protect you. After Anderson had consulted with us and then went on his own hook, and to use a parlance of the West, gave us the double cross, I am anxious, first, to protect ourselves, secondly, to prevent Anderson gaining the fruits of his fraud. Captain Webster here is against Mr. Anderson.

Yours respectfully,

Diet. F. C. R.

Copy.

305 P. S.—Since writing the within letter I have had a talk with Mr. Richard Nuzum over the matter, telling him how Anderson had treated us, and he claimed to be acting in connection with Marion Butler, who claimed to have had a complete assignment of your original contract. I told him that if we got to fighting there was little chance to do anything, and so far as I was concerned I was going to lay the facts fully before some of my friends in Congress to protect our interests. Nuzum asked me to wait before sending you any letter, and that he would try and adjust the matter and try and take care of you, myself and Major Gwyder. I expect to see them in a few days and write you. They don't seem to have a high opinion of Butler, and I think we can form some alliance with them. Major Gwyder saw McLaughlin, and he claimed that our claims would be taken care of under the old contract; that he had information to that effect from Washington. Please write me fully so that I will know how to act. I may have the major secure new contracts from the Indians under the agreement if you think it necessary. Please write me at once.

Yours respectfully,

Diet. F. C. R.

Copy.

306

EXHIBIT "R."

BISCAYNE, FLA., Feb'y 8", '06.

Hon. F. C. Robertson, Spokane, Wash.

MY DEAR SIR: Please pardon my delay in answering your very interesting letter which reached me about two weeks ago. I have been quite unwell recently & in addition have been greatly worried over the disastrous effect of flooding rains upon my crops of winter vegetables, entailing serious financial losses. Consequently as you can well imagine I have not been in a very good frame of mind for attending to outside business. I am comforted however in some measure, by the fact that my orange and grape fruit groves—which are said to be the best of their age in this section—have not been materially damaged.

I think you are mistaken in your impression that I advised any delay in securing the new contract with the Indians. If you will refer to my former letter to you & to my correspondence with Gwydir I am confident that you will find that I urged as prompt action as

possible—I know that you and Gwydir were greatly delayed primarily, by my failure to get the forms of the new contract to you as promptly as I desired; but this was really not my fault—The delay was caused by my depending upon Butler & his Associates to prepare & forward the papers as they had agreed to do when I was in Washington. All this however was gone over by me in former correspondence with you & Gwydir & it is not necessary to recapitulate.

307 You will also see in my previous letters, the exact nature of my arrangements with Butler & Associates—I made no "complete assignment of the original contract" to Butler—I did make an assignment of an interest in the original contract and also an assignment under certain conditions, of an interest in the proposed new contract, which I was to undertake to secure through my friends and associates in the State of Washington.

Butler failed to comply with his part of the agreement and attempted to perpetuate a piece of trickery which would have put me completely in his power if I had fallen into the trap he set for me—It was to guard against Butler's designs that I finally decided to have you & Gwydir take the new contract in your own name or in the name of R. D. Gwydir & Associates." I felt that you and Gwydir were honorable gentlemen whom I could unhesitatingly trust & my faith in you is still absolutely unqualified.

In regard to the validity of the claims of the Indians to the \$1,500,000, under the contract made with the Commissioners of the Government, there is not the slightest question in my mind as to their equitable right to compensation for the surrender of lands & I am confident that the courts would so decide, if permitted to take jurisdiction—The trouble however is in getting a legal status in the Courts—I may possibly be in error, but my impression is that the Indians cannot inaugurate a suit against the government, without the consent of Congress. There are I think but two avenues for redress open to them. One is to secure by a Bill in Congress a direct

appropriation for the payment of their claims: & the other is  
308 to secure by Bill or "Joint Resolution" the reference of the claim or the case to the Court of Claims.

In view of the complications which have arisen since we first decided to try for a new contract, it is an exceedingly difficult thing to determine what is our wisest course—I am sorely disappointed that you & Gwydir did not push right ahead & secure the new contract as soon as the papers reached you—That would have eliminated the complication growing out of the Anderson-McDonald Contract—& we could have taken our chances of securing the approval of the contract by the authorities in Washington—But as we did not secure the new contract we will have to do the best we can under present conditions.

It would of course be a most excellent thing for us if we could secure the permission of the Department to go on the Reservation & make a new contract with the Indians: But I am not at all sure that the Department will give in advance its official sanction to a proposed contract—My recollection is the Gwydir got the Maish-Gordon

contract without our asking permission in advance; but of this I am not positive—Gwydir will probably remember about this. At any rate if it can be secured I am satisfied that it will be necessary for me to go to Washington and attend to it personally—I don't believe anything can be accomplished by correspondence.

But the difficulty about this program is that I actually haven't the \$150.00 with which to pay the expenses of that trip—My losses from cold and flood during the past eighteen months have left me in such financial straits that I am borrowing money with which to replant my crops and take care of my groves—

309 I note your statement that the Government claims to have secured a supplemental agreement with the Indians which abrogated all other agreements. I had never heard of this "supplemental agreement". When was it made with the Indians & how? What are its terms? Have you a copy of it or have you ever seen a copy?

Who is McLaughlin & what does he mean by his statement to Gwydir that he (McL.) had advices from Washington to the effect that our interests under the old Maish-Gordon contract would be protected? How are they to be protected & by whom? Who gave McLaughlin this assurance?

If I were not so completely "strapped" financially, I believe I could go to Washington & command enough influence to prevent the approval of the Anderson-Gordon contract & possibly secure permission to send our representative on the Reservation to make a new deal with the Indians—if I had all the facts I believe I could stop the approval of the Anderson contract by correspondence; I could at any rate try to do so. But I haven't enough accurate data to make a business-like statement of the case—I don't know when he went on the Reservation, nor the date of his contract, nor how he secured it, nor who signed it nor who among the Indians did *not* sign, nor in what particular he has violated law in securing his contract—all I know is that you write me you *hear* that he made some of the Indians drunk, who signed his contract & that some failed to sign it—& that the Indians are *said* to be ready to repudiate it—but I haven't a trace of *evidence* to substantiate a single one of those statements—it is all hearsay—if the Indian Agent or some Gov't

310 Officer out there would make a positive written statement about the matter it would have weight.

The truth is I am so much in the dark as to the exact situation out there & in Washington, that I cannot advise you or counsel with you intelligently—I have no faith whatever in any promises from those other parties to take care — our interests—

Frankly I fear Gwydir made a fatal mistake in not going in & getting the contract before Anderson—if Anderson could do it surely Gwydir with his strong influence with the Indians could have succeeded more easily—if the presence of Government officials did not deter Anderson why could not Gwydir have gone ahead & gotten the new contract? He wrote me repeatedly that he had the situation well in hand & would see to it that the other crowd did not get ahead of us. I wrote him expressing my gratification & was sure

he would get the contract, if any one got it—It is a very hard task to induce the Government to throw out a crowd who are ahead of us & give the pie to us unless we could show actual ground in securing the contract—

Even if my term of service in the army were to be added to the length of the time the original Maish-Gordon contract was to run it would not help us materially—if Gwydir could induce the Indians who signed the Anderson contract and those who did *not* sign to go—the Indian Agent or other U. S. official & make a formal protest against its approval giving *valid* reasons for their protest we might defeat the approval—I fear however that the failure to secure the contract ahead of the Anderson crowd was an irreparable mistake—If you can give me any comforting news I would be glad to have you do so.

Sincerely yours,

HUGH H. GORDON.

311

EXHIBIT "S."

The Western Union Telegraph Company.

Received at

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18 collect nite

MIAMI, FLA., Mar. 8, '06.

A. C. Robertson, Atty at Law, Spokane, Wn.:

Can't promise success will do my best require full information and proofs send one fifty I write.

HUGH H. GORDON.

9:05 p. m.

312

MAR. 10, 1906.

Mr. Hugh H. Gordon, Biscayne, Fla.

DEAR SIR: I enclose you herewith a draft for \$150, which will enable you to go to Washington, and protect our interest there. I do not believe that without a recognition of your contract any subsequent contract with the Indians can be put through over your opposition. I have written you somewhat fully, but I am now reliably informed that the agreement secured by the former Indian Agent Anderson, dismissed for irregularity in the service, and taken in the name of Major MacDonald, does not include by its terms the rights of the Indians on the South half of the Reservation. This I am informed Mr. Nuzum has informed certain persons. The Indians on the south half are equally entitled to the benefits under this original agreement, for they were all a part of the same reservation, and they will have a right to take land by allotment as the north half Indians. In addition to this, Captain Webster told me that without his knowledge or consent, Anderson took his interpreter and went among the Indians, and clandestinely obtained the agreement he predicates his rights upon, and at a time when Anderson had been dismissed

from the service, and when he was charged, as I was informed by Capt. Webster, with having kept certain Guardianship moneys of the Indians that he, Webster, had been unable to get from Anderson.

It may be several bills are pending in Washington, but their character can be examined by you better than by me. If you

313      need any assistance to protect us and you bring our interests

to the attention of Senators McHenry and Foster in the Senate, and my interest to Senators Ankeny, Piles, and DuBois in the Senate, and I am satisfied that they will protect our interest to the extent that you can show that we are entitled to their protection under the rules of equity and good conscience. If you desire me to get additional agreements with the Indians here on your arrival in Washington, wire me fully, and I will send a representative there. I am unable however, to spend much money in this matter. There is no need of an affidavit for my part, because you can personally present yourself to the Department, and say that Capt. Webster has made this statement, and on that alone it seems to me, the Department would reserve its ruling until you had an opportunity to make a showing. I will make an affidavit to that effect, if necessary.

In addition to that, if any large number of Indians appear to have signed this agreement, I am satisfied that their names have been probably added without their consent. Of this of course I can have no personal knowledge.

It is reported that Mr. Nuzum and Judge Gordon are starting to Washington to be presented to the President about the 20th of this month. You should be on the ground there and protect your interests. Mr. Brusard of Louisiana, and my brother S. M. Robertson, and other Louisiana delegates, together with men who know you and me would undoubtedly protect us in this old agreement if they believed we were justly entitled to compensation. I believe

314      that an approved agreement such as you have, is much better than another approved agreement such as Anderson had; although they rely on Senator Lafoliette, who is a friend of Mr. Nuzum, and other influential Senators, to take their view of the matter.

I would not precipitously start a fight against Anderson, for this might preclude any consideration of the Attorney's fees but I could size the situation up carefully, and if our interest is not to be protected, then I would oppose them.

I will supply you here with affidavits from the Indians or others. The compensation could be made to the attorneys, should you establish their rights at law or in equity to compensation.

Trusting, sir, that you may have the best of success, and that the ides of March may bring to you growing crops claimed by winter's icy breath and the ruddy green of spring, I beg to remain,

Yours very Respectfully,

F. C. R.

Diet.

F. C. R.

As it is after banking hours, I will send the draft Monday.

# 3 H. H. G.

## EXHIBIT "A2."

SPOKANE, WASHINGTON, April 15, 1907.

Gentlemen, Butler &amp; Vale, Washington, D. C.

GENTLEMEN: I transmit to you a copy of a deposition I ask to be filed in this case. I sent the original to the Attorney General. The testimony of Mr. Gordon is not plain as to my sharing with him out of his recovery, and I desire that this be done.

Very respectfully yours,

Dict.

F. C. R.

(Not sent.)

316

## EXHIBIT "A3."

SPOKANE, WASHINGTON, April 15, 1907.

Hon. George M. Anderson, Assistant Attorney General, Washington, D. C.

Dear Sir: Today I for the first time saw a copy of Mr. Hugh Gordon's testimony. It does not seem clear that he recognizes me except as having become associated in this case with him after Nuzum arrived in Washington. As a matter of fact I have correspondence with him starting in 1904. Owing, however, to the fact, that we went fully into the question of services when you were here, I went before Mr. Avery today, and asked him to let me identify the receipt for money sent to Gordon by myself, and the contract signed in Washington by Mr. Gordon. I request you to permit this deposition to be filed, with your consent, as a part of the record. For that reason I transmit it directly to you. It is of great importance to me that this contract be admitted in evidence, because it will prevent the necessity of a dispute, probably, owing to the fact that I did not put them in as a part of my direct testimony. I did not believe they were material, thinking Mr. Gordon would make plain my testimony. I wish you to see that this is filed for really I stand in the position of an intervenor and have an independent

right to protect my own rights in connection with the co-  
317 - counsel in the case. I am satisfied that you, as the repre-

sentative of the Government, desire this matter to be fairly  
presented in this case, so that such award as may be made will be  
made by the Court of Claims with a full understanding of the rela-  
tion of the parties, and I send this directly to you as a government  
officer, because they are originals, and are of the utmost importance  
to me.

Thanking you in the premises, and trusting you may visit  
Spokane at some time when you have more time to see the beauty  
of our lake resorts in summer, and our trout streams, I am

Yours very respectfully,

Dict.

F. C. R.

# 2 G. M. A.

318

## EXHIBIT "A4."

SPOKANE, WASHINGTON, April 20, 1907.  
 George H. Patrick, Esq., 1420 New York Ave., Washington, D. C.

MY DEAR SIR: I transmit herewith to you a copy of a deposition that I make in the matter of the pending litigation with the Indians. I wish you would take this deposition up with Messrs. Butler & Vale, and if they believe it should be filed, file it directly. If they think the letter written by me in 1904 should be eliminated, I authorize you to do so, and strike it from the deposition, the same being my act. I send this correspondence to you because I don't desire to lose control of these papers, unless I know they are filed in connection with my original deposition, as they are originals and very valuable to me. I don't see why they should not be filed. If Butler & Vale and the Court of Claims recognize the contract signed in Washington, and the money is disbursed, it leaves Gordon and myself in exactly the same position we would be under this contract. If the Court should hold that the matter of quantum meruit should govern, then, of course, in judgment what I would receive as compared with what Gordon would receive, they must under this contract award me one half of what would be coming, while Major Gordon's testimony, which you can procure from Butler and Vale, does not mention me. You can explain to Messrs. Butler & Vale that I transmit this deposition to you so that you and they may act as seems to be best. At the same time kindly ascertain the situation and write me.

Yours very truly,

Fred. C. R.

#2 G. H. P.

319  
320

## EXHIBIT "A5."

JULY 25TH, 1907

F. C. Robertson, Esq., Spokane, Washington.

DEAR SIR: We have heretofore written you requesting a statement of the services which you have rendered to the Colville Indians, and forwarded you a copy of the petition filed with the Court. We have also suggested the line of services that should be shown to be effective in procuring judgment, and that is, services before Committees of Congress and the Departments, as opposed to services "before Congress" or individual Congressmen to influence Congressional action, the latter class of services is, as you know lobbying, and cannot be considered by the Court.

The law sending the case to the Court requires that services shall be proven and that in payment the kind of services shall be considered; so that it is vital, if you have rendered any services to the Indians, that it shall be affirmatively shown. And before we undertake to take testimony it is of course essential that we shall have before us a complete view of the case in this regard.

Kindly give your attention hereto, so that your statement will be in our hands before September 1st.

Very cordially yours,

BUTLER & VALE,  
By J. M. VALE.

F. C. Robertson #2.

321

EXHIBIT "A6."

AUGUST 1, 1906.

Messrs. Butler & Vale, Washington, D. C.

GENTLEMEN: I am in receipt of your favor of July 25th, and in response thereto, would say, that I have received a copy of the bill filed by you in the Court of Claims. In regard to the services that I rendered, I would beg to say that I have a written contract with Mr. Hugh Gordon for one half of the monies recovered, either in his name or in mine in this controversy. I also have a contract with you that of the money received I shall receive something less than ten thousand Dollars. I prepared a complete brief to be filed, but Mr. Butler was insistent that this was not necessary, as he had covered in his opinion, the facts in the case. I paid my own way to Washington for the purpose of consulting with the attorneys in the case; stayed there some two weeks, and also advanced the means to Mr. Gordon to be there, and in addition to this I have agreed to take care of Major Gwydir, who originally negotiated the Maish Gordon contract. I thought probably that conditions such as have arisen might present themselves, and believed I should file my written brief before the Department and before the Committee, but in view of the representations made me by Mr. Butler, I did not do so. In fact, I was induced to act under your direction in this matter by Senator Du Bois. I did see a number of individual 322 Congressmen and Senators, read my brief to at least two of them, and was prepared at any time to go before this Committee, until our complete arrangement was made.

Now, under this contract, both yourselves and Gordon are obligated to me for my share of the money received, whether or not services are proved by me. I do not understand that you will attempt to apportion these services, leaving for instance, Gordon and Nuzum to make a case of quantum meruit, myself to make a case of quantum meruit, and yourselves and Mr. Butler to make a case of quantum meruit. If you do, very many services that I have rendered can be shown that I believed it to be immaterial to burden you with, including services I believe to be of great value to the Indians. I will therefore cooperate with you in making any proof along any of the lines of the services in consultation or actually rendered. I fully consulted with Mr. Nuzum, and did all I could to bring the conflicting interests together in this matter.

Now, I want to know where I am at. If you have any hesitancy in protecting me under our contract, and I called that to your attention, and you did not answer, I will hire, personally, attorneys in Washington, and intervene in the suit or at least ask permission to

prove all the contracts in existence, so that my rights may be protected. I am very anxious to co-operate with you, as I said before, but I do not want any question of confusion to exist between us. I want to know where I am at. If I have to make my own case, I shall make it in my own way. I want a square understanding as to what I am to receive, and how I am to go about in full co-operation

with you as attorneys to show meritorious services on my  
323 part and on yours. You can understand that the existence

of the contracts with us eliminates to a great extent the question of *quantum meruit*, among those attorneys who have cooperated together under the same claimed contracts, and this was the understanding with which these provisions were placed in the bill, and this bill was passed referring to other attorneys than yourselves. It seems to me that we could be of great service to you, as well as in showing the continued effort made under the Maish Gordon contract for a number of years, the new contract with the Indians practically a continuation of the old, and continuous services rendered.

I think I have about outlined my views in this matter, but I am ready to defer to the superior judgment of yourselves, and Mr. Butler to the extent of cooperating to the full limit in making this proof. I doubt the advisability of attempting to take depositions here. It might stir up ... my opinion endless opposition, and probably result largely in starting opposition, especially to the new contract, that might defeat to some extent the recovery. Some time ago I wrote fully to Mr. Gordon my views with regard to bringing action in the District Court in the names of the Indians, and have largely examined the legal questions involved, independent of any briefs that you may have written, and when there was fully informed on the subject without knowing that you claimed to have matters in hand. You recollect Mr. Butler said to me, "Don't file a brief. I have the positive promise of the Conference Committee that they will recommend the direct payment to us without reference to the Court of Claims, of the money asked for, and I have made such concessions to

324 others that I would receive a fee not as great as Mr. Nuzum and *and his associates*. Therefore, the concession I make to you is the utmost I can make." On the strength of this statement that I fully relied upon and believed, and which must have been the belief of Mr. Butler, I entered into the contract, and from that time on acted under the idea that the business in hand should be confined solely to Mr. Butler. I would therefore, at this time, like to know what you want me to do to assist you; whether you fully coincide with my statement that no matter whether this money is allowed individually to Butler & Vale or others I am entitled to my share under the agreement made between Butler individually, Butler & Vale, Hugh Gordon and R. W. Nuzum, and this being so, I want you to let me know distinctly what I am expected to do, and whether or not these views meet with your approval.

Very respectfully,

F. C. ROBERTSON

Dict. F. C. R.

#2 B. & V.

325

## EXHIBIT "A7."

NOVEMBER 14TH, 1907.

F. C. Robertson, Esq., Spokane, Wash.

MY DEAR SIR: I have yours of the 9th inst. to the firm in the matter of Gordon's intervention.

I have moved to dismiss four of the intervening petitioners, namely, those of McGee and Gwydir et al., represented by Stockslager & Heard, of this city, and those of May and Miller, administrator of Maish, represented by Mr. May. I have also filed answers to the intervening petitions of Miller, Administrator, and May. Later, I will file an answer to the Gordon petition, and also will file a motion to dismiss and expect to have the whole question of the right to intervene up at the time of final hearing.

I really have no fear as to the result, and you may be sure, and all others, that your interests will be protected by us in accordance with the several agreements we have with attorneys. But if we should be compelled now, or at any future point in the proceedings, either before this court or before the Supreme Court of the District of Columbia to meet the issues raised by these several intervening petitions, I rely on your testimony to show that Mr. Gordon acted for himself and associates, and as the survivor of Maish and Gordon, and so held himself out to you and to Butler & Vale and to all others up to the time of the passage of the jurisdictional act. Is this your understanding and recollection of the facts?

326 I had in mind to use your affidavit with a view to showing Mr. May, in conference, that he had no case; but, on reflection, I do not think there is any way but to clean him out on a square stand-up fight, which will unquestionably, be the result.

Very truly yours,

J. M. VALE

327

## COMPLAINANT'S EXHIBIT 6.

2022 N ST. N. W.,

WASHINGTON, D. C., Nov. 18th, 1907.

Hon. R. D. Gwydir, Spokane, Wash.

MY DEAR GWYDIR: You of course know of the disreputable effort, which Butler & Vale are making to rob me & you & every other honest man in this case, who holds a contract with me—I am here to give them the fight of my life, & if there is justice to be had, we will wipe up the floor with them. Col. Stockslager has doubtless written you that we are in absolute harmony & accord—I have never had a thought other than to stand loyally by the men, who have been square with me—But some of the men, who hold contracts under me & were employed to aid me, in winning my fee, *have not* been straight & square & I am inclined to believe that Henderson went back on me & joined Butler in his scheme to *fleec* all the rest of us—I am not dead sure of this, but I want to know the truth.

Now treat all that I am saying as *absolutely confidential*. I know you are an honorable man & that I can trust you—It is of vital importance to me — know at *earliest moment possible* the *truth* about Henderson—I mean D. B. Henderson. There are certain things that I *know* & others that I have heard which make me believe that Henderson was in some way mixed up with Butler  
328 or with McDonald or some of these schemers who have been plotting for two or three years to beat us out of our rights. You might talk with Wendall Hall in strict confidence & get him to cooperate with you in getting up for me any evidence which will throw light on Henderson's conduct. I have good grounds for suspecting that while acting here as one of *my* attorneys he was a party to an effort to get a new contract with the Indians, which would have left out you & me & May & all of our friends: & since then I have run up on something tending to show that he is or has been mixed up in some way with Butler's dirty work—Now if you & Hall can quietly go to work & get at any facts about Henderson which will show me the *truth* as to his loyalty or *disloyalty* to me, it may be of great service to me: & in case it comes to a scrap—I mean a legal fight—between me & Henderson & I win, I will remember you & Hall *substantially*, if you can give me material help. If Henderson has been *square* with me I want to see him get every dollar promised him by me, just as I intend that you & Hall & your other associate shall receive every dollar promised you in case we wallop Butler as I believe we will; but confidentially if Henderson has attempted to betray me & joined Butler in the attempt to fleece us, he ought not to receive a cent. What I want to know is, the *truth*—I want to *do right* in his case, as well as in all others.

Be especially careful to say nothing to Robertson or Nuzum or any of those interlopers—Don't let a one of that Crowd know that you have heard from me—I found out last year that Robert-  
329 son was not your friend & would have gone back on you if he had had the chance.

Keep your own counsel: but get *at once* all the information you can about Henderson. As soon as this reaches you, write me *at once* telling me what you may know *now*, then hunt judiciously for reliable information & write me about that later, but as soon as you can.

My honest conviction is that we will defeat the disreputable plot these scamps are trying to carry into execution.

Write me promptly—with best wishes, I am

Faithfully yours,

HUGH H. GORDON.

2022 N St. N. W.

## (Envelope.)

After 5 days return to  
Mr. Hugh H. Gordon,  
2022 N St. N. W.

Washington, D. C.  
Nov. 18  
9:30 P. M.  
1907. 1C

Hon. R. D. Gwydir

Spokane

Washington

Find present address &  
deliver promptly.

Spokane, Wash.  
Nov. 23  
7:30 A. M.  
1907.

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## COMPLAINANT'S EXHIBIT NO. 7

2022 N St. N. W.,  
WASHINGTON, D. C., Dec. 19th, 1907.

Hon. R. D. Gwydir, Spokane, Wash.

MY DEAR GWYDIR: I have yours of 11th Dec. & am glad to hear from you. You have evidently misunderstood my letter. If you will read it again, you will see that I am not trying to find out what Henderson *is doing now* or what he has been doing *since we secured the appropriation*. What I am after is to ascertain whether or not he was in the plot with Butler & Nuzum & McDonald & the crowd who have tried to beat us out of our rightful interest in this fee—McDonald & Nuzum & a lot of those fellows out there, came here with a fake contract—a flimsy pretense, which was a sham & a fraud—utterly worthless—and they went to Butler with it—This was in 1905, I think—At any rate it was some time ago—They all—Butler included—knew that this fake contract was a fraud & utterly worthless yet Butler went into a deal with this crowd, by which he was to take this fake contract as a pretext & attempt to grab the entire fee & rob me and every honest man associated with me—I presume that you already know the most of these details.

Now I have strong reasons for believing that Henderson went into this conspiracy—I have already evidence enough to convince me that Henderson as well as Butler was a traitor to me.

331 You know both Butler & Henderson were employed by me—

They had no contract with the Indians—They were my attorneys & my representatives & were both by their contract & by professional honor bound to be loyal to me & to my interests—My belief is that Henderson was just as treacherous as Butler & that he went into the plot with Butler to rob me & you & May & every other honest man in the case.

I was in hopes that you could get on Henderson's trail to find out

if he was not "standing in" with McDonald & Nuzum and that crowd of would-be interlopers out there.

I want to repeat my *caution* that you proceed very *carefully*—Don't let even your most intimate confidants know that you are acting in this matter at my suggestion—if you ask questions, do so, as if you wanted the information for your own use. As a matter of fact I am not ashamed of this effort—I would not hesitate to openly declare I was hunting for this evidence if that was the wisest way to get the evidence—My only reason for keeping in the background is that I want to get the evidence—to get at the truth—and I have thought you could work most effectively by proceeding along the lines I have suggested.

Now in regard to your testimony, I see no reason why you should not give it at once—it is important that you emphasize the fact that the Maish-Gordon contract is the only contract ever legally executed by Indians interested in this claim and the only contract relating to this claim ever approved by the Department.

You also want to testify that Major Hugh H. Gordon as the surviving *Associate* (Not Partner) in the Maish & Gordon contract, is the only person to whom the fee in this case could legally & rightfully be paid.

332 Also that every man who has a trace of right to appear in this case or act in behalf of these Indians in any way must derive that power from Maish & Gordon, or from Major Gordon the surviving *Associate* of Maish & Gordon.

I think it would also be wiser for you to have your attorney Gen'l Jones write Steckslager that it is *your* wish that he take the ground that the court should pay the fee to *me*—If we secure 15% you will be promptly paid your \$30,000 (for yourself & Hall & your other associates) & if we get 10% only, you will get promptly your \$20,000—(to be divided between you three). If we start any divisions of the fee in the court we are liable to have a lot of complications with these claims by these outside interlopers—but if all our friends will concentrate in asking the Court to pay the fee to me—which is the *only legal* & the *only* right thing to do, I believe our fight against Butler & these outside schemers will be greatly strengthened. Col. Steckslager understands fully that I am as I have always been—absolutely loyal to you—And so far as I know he is ready to take the position I have suggested—I will tell you all about Robertson when I see you—In mean time you may rest assured that I know whereof I speak—But keep your own counsel about this & steer clear of any deals with him.

Treat my letters & all I say to you as strictly confidential—I believe we will win the fight here.

Faithfully yours,

HUGH H. GORDON

333

(Envelope.)

After 5 days return to  
#2022 N St. N. W.

(Stamp.)

Washington, D. C.,  
Dec. 19,  
9.30 P. M.,  
1907.Hon R. D. Gwydir,  
Care Superintendent of Streets,  
Spokane,  
Washington.

Personal.)

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COMPLAINANT'S EXHIBIT #8.

*Postal.*

WASHINGTON, D. C., May 26, '06.

MY DEAR GWYDIR: I wrote you some days ago to send one of the contracts on here to Butler & Vale—They now say they will need all the copies—that is the contracts with *all* the tribes. You will remember I had them expressed to you about two years ago. Butler & Vale say they will need all these copies to put our case through the Court of Claims to which it has been referred.

Please express all copies of the old Maish & Gordon contract to Butler & Vale, Bond Building Washington, D. C. Please attend to this *at once*—Rush these papers on by first train.

Yours faithfully

HUGH H. GORDON,

*Biscayne, Fla.*

I go to Florida tonight.

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(Face of Postal Card.)

Spokane, Wash.	Washington, D. C.
May 30,	May 26,
9 A. M., 1906.	4:30 P. M.,
	1906.

*Postal Card.*

The Space Below is for the Address Only.

Major R. D. Gwydir,  
Care Supt. of Streets,  
Spokane,  
Washington.

*Opinion of Court.*

Filed Jul- 13, 1909.

In the Supreme Court of the District of Columbia.

No. 28000. Equity.

INDIAN PROTECTIVE ASSOCIATION, Complainant,  
vs.

CHARLES H. TREAT, Treasurer, et al., Defendants.

No. 28001. Equity.

INDIAN PROTECTIVE ASSOCIATION, Complainant,  
vs.CHARLES H. TREAT, Treasurer, etc., et al., and HEBER J. MAY,  
Defendants.

No. 28005. Equity.

RICHARD D. GWYDIR et al., Complainants,  
vs.

CHARLES H. TREAT, Treasurer, et al., Defendants.

No. 28003. Equity.

FREDERICK C. ROBERTSON, Complainant,  
vs.

HUGH H. GORDON et al., Defendants.

The above entitled causes were brought by the respective complainants for the purpose of enforcing alleged liens against certain moneys in the Treasury of the United States, payable to the defendants Hugh H. Gordon, Benjamin Miller, administrator and Heber J. May; and the said causes were consolidated, and have been heard together.

The cause of the Indian Protective Association against Treat et al., No. 28001, seems to have been adjusted, for it is not insisted upon by counsel in the final hearing; and it is stated that the money sought to be impressed with a lien in favor of the complainant in that suit, has been drawn from the Treasury by the defendant Heber J. May, and all claims in regard thereto settled.

In said Equity cause, No. 28000, the Indian Protective Association seeks to recover a portion of the funds which were awarded by the Court of Claims to the defendant Hugh H. Gordon, and the defendant Miller, administrator of Levi Marsh, deceased, said Association claiming as assignee of one Richard C. Adams, the said Adams having received an assignment from said Heber J. May, and from one Daniel B. Henderson, of all their rights under a certain contract with the defendant Hugh H. Gordon, dated January 1, 1901.

The complainant in said cause No. 28005 claims a one-half interest in the moneys awarded to the defendant Hugh H. Gordon by the Court of Claims, which he seeks to recover. The Treasurer of the United States has paid the money over to the receivers appointed by this Court, who have in their custody \$22000 being \$14000 awarded to said Gordon, \$6000 to said Miller, and \$2000 to said Robertson, he having voluntarily brought the \$2000 into this Court to be added to the \$14000 awarded to Gordon, and he claims \$8000 out of the sum thus made.

Richard D. Gwydir, et al., complainants in No. 28005 Equity, are claiming six forty-fifths of the total amounts awarded to said 338 Gordon and said Maish, their claim being under a contract dated June 15, 1894, made with said Gordon and Levi Maish, and which was for services rendered by said complainants in connection with said Gordon and Miller in securing the Indian contract referred to in these proceedings as the Maish and Gordon contract, and which was dated May 12, 1894, was duly approved by the Secretary of the Interior and the Commissioner of Indian Affairs, and which expired by its own terms on July 25, 1901.

The controversy raised by these various proceedings is over the distribution of the said \$22000 formerly in the Treasury of the United States, but now in the custody of this court through the receivers.

The funds were awarded to the various parties by the Court of Claims, under the Act of June 21, 1903 (34 Statutes-at-Large, 377). All the parties now seeking relief in this court appeared in the Court of Claims in the proceeding instituted there by Butler and Vale, under the said Act of Congress; and said Robertson was awarded \$2000 in his own right, said Daniel B. Henderson \$7000, and said Heber J. May \$3000.

The said corporation known as the Indian Protective Association, and the complainants in said Equity cause No. 28005, received nothing in the Court of Claims, because it was not shown that they had any contracts with the said Indians, or that they had rendered any services for the said Indians.

Before the order of consolidation was made herein, the case of Gwydir, et al., against Trent, et al., No. 28005 Equity, was set down for hearing on the bill and answer, and the court heard the 339 same, and reached a conclusion, which was stated in my opinion filed in the case, and afterwards published in Vol. 35, Washington Law Reporter, 691.

After considering the arguments of counsel, and the testimony taken and submitted, I am unable to reach any other conclusion in regard to the rights of the complainants in that cause; and for the reasons stated in said opinion, I adhere to the conclusion therein stated.

As to the contentions herein on behalf of the Indian Protective Association, that is, as assignee of the contract made by Henderson and May, is entitled to enforce said contract here, my conclusion is adverse to the right of the complainant for several reasons.

First, the contract with Henderson and May, made by Gordon,

clearly contemplated a recovery under the Marsh and Gordon contract, and none other, and no recovery in fact was made under that contract.

Second, said Henderson and May were each awarded a sum supposed to represent the amount that their services were worth in behalf of said Indians in the Court of Claims, and therefore they had nothing further to assign to the Indian Protective Association, for their claims have been allowed and paid.

There are other objections raised to the right of said Indian Protective Association, one of which was strongly argued, to the effect that the Association itself was defunct as a corporation. Without passing upon that question, I am satisfied from my examination and consideration of the case, that the claim of the said Indian Protective Association, made in said Equity cause No. 28000, must be denied.

340 As before stated, the controversy made in said Equity cause No. 28001 has been in some way settled between the parties and is not further contested.

This leaves for consideration the rights of the complainant Frederick C. Robertson in Equity cause No. 28003. This complainant not only appeared in the said cause in the Court of Claims, and asked for compensation, but was there awarded \$20000 as the full measure of his services in behalf of the said Indians. He now claims that he is entitled to \$3000 more out of the award to Hugh H. Gordon. That is to say that he and said Gordon were to share equally in the fees that were to be received by them in said cause. His claim is made under a contract signed Mar. 28, 1900, as follows:

This agreement runs between F. C. Robertson and Hugh H. Gordon, witnesseth that they shall share equally to all monies appropriated by Congress or allowed by the Interior Department which may accrue to said Gordon or said Robertson as attorney for growing out of the rendition of services to the Colville tribe of Indians, whether allowed under the Marsh-Gordon contract with said tribes or on any other theory whatever, which said interest is to accrue to either party, no matter in whose name such allowances are made. Both parties hereto in virtuous labor to secure such allowance. Out of said Robertson's share he agrees to compensate H. H. Gwydir by a reasonable compensation. The fees to be divided between said Robertson and said Gordon as herein provided shall be the net sum actually received by said Gordon after settling with other attorneys under existing contracts heretofore made by said Gordon.

F. C. ROBERTSON  
HUGH H. GORDON

This contract strictly argued would apply only to monies that were appropriated by Congress or allowed by the Interior Department, to one of both of these parties, and does not by its terms apply to monies allowed by the Court of Claims for the actual value of the services of said attorney. It was evidently made in anticipation of a direct appropriation by Congress to the attorney in an allowance by the Interior Department under a new contract which it was

Proprietary

Hugh H. Gordon, recover of the complainant, Robertson, his costs of suit to be taxed by the Clerk and have execution thereof as at law.

It is further adjudged, ordered and decreed that the receivers pay and turn over to the complainant the \$2000 in their hands awarded to him by the Court of Claims as set out in these proceedings, less 3 per centum thereof to be deducted therefrom as receivers' commissions and the costs taxed as aforesaid to be also deducted therefrom.

It is further adjudged, ordered and decreed that the balance in their hands awarded to Hugh H. Gordon by the said Court of Claims, after payment of the sum this day decreed to the complainants in Equity cause No. 28005 and after deduction of 3 per centum of \$14000 as receivers' commissions, be paid and turned over by the receivers herein to said Hugh H. Gordon or his solicitors of record.

By the Court:

JOB BARNARD, *Justice.*

From the above decree the complainant prays an appeal in open court and the amount of the appeal bond to operate as a supersedeas is hereby fixed at One thousand dollars and if for costs only at one hundred dollars or a deposit of that sum in the registry of the Court.

JOB BARNARD, *Justice.*

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*Memorandum.*

August 4, 1909.—Appeal bond approved and filed.

*Stipulation.*

Filed Sep. 11, 1909.

In the Supreme Court of the District of Columbia, Holding an  
Equity Court.

No. 28006.

FREDERICK C. ROBERTSON, Complainant,

vs.

HUGH H. GORDON et als., Defendants.

*It is hereby stipulated and agreed* that all the stipulations and agreements made during the taking of testimony and trial of the above entitled cause be and the same are hereby re-affirmed and re-entered into as respects the hearing upon appeal before the Court of Appeals of the District of Columbia, to-wit:

Each party shall be at liberty to refer, as if part of the record and properly pleaded and proven herein, to

(1.) All records of the Court of Claims in the case of Butler and Vale against the United States and the Indians on the Colville Indian Reservation, No. 29526, in that court;

345 (2.) The proceedings before Congress respecting the said Colville Indians and their claim, as appearing in the Congressional Record:

(3.) The records of the suits Nos. 28000 and 28005 in the Supreme Court of the District of Columbia, the Indian Protective Association and R. D. Gwydir and others against Hugh H. Gordon, and others involving the same fund the subject of this suit.

*Solicitor for Frederick C. Robertson,*

*Complainant and Appellant.*

JAMES B. ARCHER,

*Solicitor for Hugh H. Gordon, Defendant.*

KAPPLER & MERRILLAT,

*Solicitors for Butler and Vale, Defendants and*

*Cross-complainants, Appellees.*

September 11, 1909.

*Order for Transcript of Record on Appeal.*

Filed Sep. 11, 1909.

In the Supreme Court of the District of Columbia, Holding in Equity.

No. 28006.

FREDERICK C. ROBERTSON, Complainant,

vs.

HUGH H. GORDON et als., Defendants.

346 The Clerk will please make up a complete transcript of the record in the above entitled cause for appeal to the Court of Appeals of the District of Columbia, at its next term, in accordance with the rules and practice in such case made and provided. A schedule of the same is appended.

Very respectfully,

*Solicitor for Complainant and Appellant.*

*Schedule.*

1. Robertson bill and exhibits.
2. Restraining order.
3. Injunction order.
4. Motion for consolidation of causes.
5. Order of consolidation and appointment of receivers.
6. Gordon's original answer, and exhibits.
7. Exceptions to same.
8. Order sustaining exceptions.
9. Gordon's second answer.
10. Replication.
11. Butler and Vale's cross-bill, answer, etc.

12. Butler and Vale's amendment.
13. Demurrer to same.
14. Order sustaining demurrer and dismissing cross-bill.
15. Amendment to same.
16. Opinion of Court on demurrs.
17. Butler and Vale's appeal, and appeal papers.
18. Spokane testimony.
19. Washington testimony.

347      20. Opinion of Court at final hearing.

21. Final decree in cause; allowance of appeal, etc.
22. Bond and security on appeal.
23. Stipulations.
24. Any other document in case omitted herefrom but required under the rules to be included in complete record on appeal.
25. Order extending time for appeal bond.

Service of copy of the above acknowledged this September \_\_\_, 1909.

JAMES B. ARCHER, JR.,  
*Sol'r for Hugh H. Gordon,*  
 KAPPLER & MERRILAT,  
*Sol'rs for Butler & Vale.*

*Memorandum.*

September 13, 1909.—Time in which to file Transcript of Record in Court of Appeals extended from time to time to and including October 15th, 1909.

348            Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,  
*District of Columbia, ss:*

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 347 both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in Equity Cause No. 28003, wherein Frederick C. Robertson is Complainant and Hugh H. Gordon et al. are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 13th day of October A. D. 1909.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 2077. Frederick C. Robertson, appellant, vs. Hugh H. Gordon et al. Court of Appeals, District of Columbia. Filed Oct. 13, 1909. Henry W. Hodges, clerk.

MONDAY, February 14th, A. D. 1910.

No. 2077.

FREDERICK C. ROBERTSON, Appellant,  
vs.

HUGH H. GORDON, MARION BUTLER, and JOSIAH M. VALE, Individually and as Partners under the Firm Name and Style of Butler and Vale.

The argument in the above entitled cause was commenced by Mr. G. H. Patrick, attorney for the appellant, and was continued by Messrs. J. B. Archer and H. H. Gordon, attorneys for the appellees, and was concluded by Mr. G. H. Patrick, attorney for the appellant.

No. 2077.

FREDERICK C. ROBERTSON, Appellant,  
vs.

HUGH H. GORDON et al.

*Opinion.*

(Mr. Chief Justice SHEPARD delivered the opinion of the Court:—)

This is one of three suits by different parties to recover a part of the fee awarded to Hugh H. Gordon, and to Gordon and Miller administrator of Levi Maish, by the Court of Claims, on May 25th, 1908, for services rendered to the Indians of the Colville Reservation in the State of Washington. The first suit, that of Gwydir vs. Gordon et al., has been determined at the present term. The other suit, that of the Indian Protective Association against Gordon and Miller was consolidated for hearing in the court below with the present case. Separate decrees were rendered, and appeals have been separately taken. The complete history of the Indian contract with Maish and Gordon, and the award of the Court of Claims thereunder will be found in the report of the case of Butler vs. Indian Protective Association et al. (38 W. L. R. 59) and in the opinion in Gordon vs. Gwydir (Present Term).

The bill in the present case sets out the contract between the Indians and Maish and Gordon, for the prosecution of the claim of the Indians against the United States for the sum of \$1,500,000.00, May 12th, 1894. Said contract was to expire in ten years. In the appropriation bill, approved June 21st, 1906 (34 Stat. 325) the determination of the fees payable by the Indians to the attorneys representing them, was referred to the Court of Claims.

The contract on which this suit is brought is set out in the bill as follows:

MARCH 28TH, 1906.

"This agreement made between F. C. Robertson and Hugh H. Gordon; Witnesseth, that they shall share equally in all monies

appropriated by Congress, or allowed by the Interior Department, which may accrue to said Gordon or said Robertson as attorney fees, growing out of the rendition of services to the Colville tribe of Indians, whether allowed under the Maish Gordon contract with said tribes, or on any other theory whatsoever, which said interest is to inure to either party, no matter in whose name such allowance is made. Both parties hereto to mutually labor to secure such allowance. Out of said Robertson's share he agrees to compensate R. D. Gwydir by a reasonable compensation. The fees to be divided between said Robertson and said Gordon as herein provided shall be the net sum accruing to said Gordon, after settling with other attorneys under contracts heretofore made by said Gordon."

F. C. ROBERTSON.  
HUGH H. GORDON.

On May 25th, 1908, the Court of Claims adjudged that the total amount due by the Indians to attorneys was \$60,000.00 among whom the same was divided. \$14,000.00 were awarded to Hugh H. Gordon; \$6000.00 to Miller, administrator of Maish; and \$2000.00 to Frederick C. Robertson. Robertson claims that by virtue of the contract aforesaid the sums awarded to him and to Gordon should be added together and equally divided between them. The payment of the funds was stayed and the same were afterwards delivered to receivers appointed in the course of these proceedings to hold the same pending the final determination of the claims thereto.

The defences set up in the answer of Gordon are that the services stipulated for in the contract sued on related to the procuring of a new contract with the Indians, the former contract of Maish and Gordon having expired by limitation. And further that the complainant Robertson submitted his claim for services to the Court of Claims, had an award made to him and is bound thereby.

After a hearing on pleadings and evidence the court dismissed bill.

Our conclusions from the testimony are these. Robertson was brought into the negotiations by Gwydir, after the contract of Maish and Gordon with the Indians had expired by limitation, in an attempt by Gordon to have Gwydir make a new contract with the Indians similar to the old one, and either in the name of Gordon and associates, or Gwydir and associates.

The contract between Gordon and Robertson, of March 28th, 1906, was made when all of the parties claiming to represent the Indians were working to secure from Congress a direct appropriation of fifteen per cent of the entire amount appropriated to the Indians. Gordon had interested Butler and Vale and others with him, and his relations with them had become strained. He suspected Butler and Vale of an intention to secure the bulk of the allowance. There was also another attorney, one Nuzum, who claimed to represent the Indians under some arrangement independent of and conflicting with the Maish and Gordon contract. While the matter of the appropriation was pending in Congress, to wit on April 3d, 1906,

Gordon, Butler, Vale and Robertson, executed the following agreement with each other:

"The undersigned hereby stipulate and agree that their respective claims for services rendered the Colville Indians be submitted to the Conference Committee of the Senate and House of Representatives on a quantum meruit, and agree to stand to and abide by any award which shall be made in the premises, and in case no award shall be made the rights of the said parties shall remain unaffected.

This the 3d day of April, 1906.

HUGH H. GORDON,

*For Himself and Associates.*

MARION BUTLER,

*For Himself and Associates.*

F. C. ROBERTSON,

BUTLER & VALE."

Subsequently, it seems, they had hopes, by joining with Nuzum, of obtaining the appropriation before referred to of \$150,000.00 and the following agreement was then made:

"WASHINGTON, D. C., Apr. 12, '06.

This agreement made and entered into between Marion Butler on his own behalf and on behalf of his associate counsel, R. W. Nuzum, on his behalf and on behalf of his associates, and Hugh Gordon and F. C. Robertson; Witnesseth:

"That whereas, each of the said parties mentioned herein have rendered services as attorneys for the Colville Indians and claim the right to participate in any appropriation made to pay said attorneys' fees;

"Now, therefore, Provided the sum of one hundred and fifty thousand (\$150,000.00) — is allowed for the payment of attorneys representing said tribe of Indians then of the said sum eighteen thousand seven hundred and fifty (\$18750) dollars is to — paid to the said R. W. Nuzum for himself and associates and nine thousand three hundred and seventy-five (\$9375) dollars to Hugh Gordon and nine thousand three hundred and seventy-five (\$9375) dollars to F. C. Robertson; the remainder of said sum to be distributed by the said Marion Butler as he elects. Should the appropriation be less, then this agreement is to be the basis of the distribution, sharing pro rata in such diminished sum, as the percentage is thereby diminished.

"In witness whereof we have hereunto set our hands and seals at the City of Washington, the day and date above written.

R. W. NUZUM. [SEAL.]

HUGH H. GORDON. "

F. C. ROBERTSON. "

MARION BUTLER. "

The scheme to induce Congress to make this appropriation failed, and the final result was the action of the conference committee of the two houses of Congress, which was incorporated in the Act of

June 21st, 1906, referring the matter of the attorneys' compensation to the Court of Claims. When the Butler and Vale petition was filed in that Court, Robertson's depositions were taken. He testified fully as to his services in the Indian Claim, and says that he paid one third of the cost of taking the depositions. He was advised by Butler and Vale not to intervene in the said cause, as Gordon and others subsequently did, they assuring him that he would be protected by them under their agreement made before Congress acted. Butler and Vale, it will be remembered, expected to have the entire amount of the fee awarded to them, for distribution. Disappointed by the result in the Court of Claims, they attempted to recover the entire amount after award by the proceeding heretofore referred to. That attempt was finally defeated. See Butler vs. Indian Protective Association et al. 38 W. L. R. 59. The record of the proceeding in the Court of Claims was not introduced in evidence, beyond a copy of the final judgment. The testimony shows that Robertson did not file a formal petition of intervention, but his deposition was taken in proof of his services, and the award of \$2000.00 was made to him therefor. On April 15th, 1907, he wrote to Butler and Vale, whom he understood as representing him also, as follows:

SPOKANE, WASHINGTON, April 15, 1907.

Messrs. Butler & Vale, Washington, D. C.

GENTLEMEN: I transmit to you a copy of a deposition I ask to be filed in this case. I sent the original to the Attorney General. The testimony of Mr. Gordon is not plain as to my sharing with him out of his recovery, and I desire that this be done.

On the same day he wrote to the Assistant Attorney General, who by the terms of the Act was required to represent the Indian interest, referring to the fact that it was not clear to him that Gordon recognized him as having become associated in the Indian service, until after Nuzum arrived in Washington. He enclosed his deposition, referring to which he said: "I wish you to see that this is filed for really I stand in the position of an intervenor and have an independent right to protect my own rights in connection with the co-counsel in the case. I am satisfied that you as the representative of the Government, desire this matter to be fairly presented in this case, so that such award as may be made will be made by the Court of Claims with a full understanding of the relation of the parties, and I send this directly to you as a government officer, because they are originals, and are of the utmost importance to me."

As the actual deposition given by Robertson must have been returned to the Court by the officer taking the same, it is probable that this deposition was a sworn statement, with exhibits, by Robertson of his services and interests. It may have been one prepared in response to a request of Butler and Vale in a letter to him of July 25th, 1906. They say in this letter:

JULY 25TH, 1906.

F. C. Robertson, Esq., Spokane, Washington.

DEAR SIR: We have heretofore written you requesting a statement of the services which you have rendered the Colville Indians, and forward you a copy of the petition filed with this court. We have also suggested the line of services that should be shown to be effective in procuring the judgment, and that is, services before Committees of Congress and Departments, as opposed to services "before Congress" or individual Congressmen to influence Congressional action; the latter class of services is, as you know lobbying, and cannot be considered by the Court.

The law sending the case to the Court requires that services shall be proven and that in payment the kind of services shall be considered; so that it is vital, if you have rendered any services to the Indians, that it shall be affirmatively shown. And before we undertake to take testimony it is of course essential that we shall have before us a complete view of the case in this regard."

(Robertson's reply to this letter, too lengthy to copy, indicates his expectation that Butler and Vale would protect his interests.)

The testimony, however, does not show with any certainty what this enclosed deposition actually was. During his examination as a witness in this case Robertson was shown a certified copy of his deposition that was taken in the regular manner before the Court of Claims, and the same was admitted. It appears that he then testified that he became interested in the Maish and Gordon contract in 1903, and that his arrangement with Gordon was "entirely verbal"—"nothing documentary." He undertook to explain this by saying that he was not asked as to any subsequent contract with Gordon, but simply as to when he originally became interested in the matter. His evidence as to any service to Gordon before the date of the contract sued on—namely March 28, 1906, clearly began in the attempt through Gwydir to have a new contract made with the Indians for which Gwydir was to be compensated.

The contract of March 28th, 1906, seems broad enough in its terms to apply to fees that might be received by Gordon under direct appropriation or otherwise, on account of his Indian contract, and would, we think, warrant a recovery by Robertson, if it were not for the subsequent contracts and proceedings. When the new agreements of April 3d. and April 12th, 1906, before stated, were made, two situations were contemplated. The first was that the matter of the award might be considered by the conference committee, and made on a quantum meruit basis, in which event they were to stand, and abide by any award so made. Hoping by joining with Nuzum, who claimed under some other contract, to obtain an appropriation of the entire sum of \$150,000.00, they entered into the agreement providing for a different distribution, in which Gordon and Robertson were separately provided for. These new agreements took the place of all former ones between the parties; one to control in one probable event of Congressional action, the

other to control in another. The result provided for in the agreement of April 3d occurred, but not exactly as anticipated.

The quantum meruit basis was adopted by Congress, but instead of determining the several amounts by its own action, it referred that determination to the Court of Claims. It is not necessary to decide whether the contract of April 3d embraced any other determination on the basis of quantum meruit, than that expected to be made by Congress directly, and would not apply to its determination by reference to the Court of Claims.

Whatever view may be taken of this, certainly those who appeared in that Court and presented their claims for adjudication and received separate and distinct awards therefor, are bound by their action and the judgment rendered thereon.

The proceedings on the petition of Butler and Vale were informal, and there was no occasion that they should be otherwise. Although Robertson did not appear by formal pleadings, it is clear that he considered himself a party, testified in support of his claims, and anticipated an award therefor. He did not undertake to magnify the services of Gordon in the expectation of subsequently sharing with him, but magnified his own by giving them an earlier date than he was entitled to under his original contract with Gordon. His interests were apparently represented by Butler and Vale. As a separate award was made to him and to Gordon on the quantum meruit basis, we think that his conduct, though lacking a formal pleading, was sufficient to bind him by the judgment rendered, and that he is estopped to contradict that judgment.

Agreeing with the conclusion of the learned trial justice, as we do, the decree will be affirmed with costs.

Affirmed.

January Term, 1910.

No. 2077.

FREDERICK C. ROBERTSON, Appellant,

vs.

HUGH N. GORDON, MARION BUTLER, and JOSIAH M. VALE, Individually and as Partners Under the Firm-name and Style of Butler and Vale.

TUESDAY, March 1st, A. D. 1910.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, It is now here ordered, adjudged, and decreed by this Court that the decree of the said Supreme Court in this cause be, and the same is hereby affirmed with costs.

Per Mr. CHIEF JUSTICE SHEPARD.

March 1, 1910.

Court of Appeals of the District of Columbia, October Term, 1910.

No. 2077.

FREDERICK C. ROBERTSON, Appellant,  
vs.

HUGH H. GORDON, MARION BUTLER, and JOSIAH M. VALE, Individually and as Partners Under the Firm-name and Style of Butler and Vale, Appellees.

*Petition for Appeal.*

The above named appellant, considering himself aggrieved by the order and decree made and entered in the above entitled cause on the 1st day of March, A. D. 1910, affirming the order and decree of the Supreme Court of the District of Columbia of July 15, 1909, dismissing the bill of complaint and dissolving the injunction herein, hereby appeals from said order and decree to the Supreme Court of the United States, and prays that appeal be allowed, and that a transcript of the record, proceedings and papers upon which said order and decree was made, duly authenticated, may be sent to the said Supreme Court of the United States; and petitioner files in said cause an assignment of errors setting forth and specifying the several errors complained of in the manner provided by law, prays that said order and decree of this court may be reviewed and reversed, and offers to execute such bond, with good and sufficient surety as may be required by the Court in the premises.

Dated March 14, 1910.

FREDERICK C. ROBERTSON, *Appellant,*  
By GEO. H. PATRICK, *His Attorney.*

(Endorsed:) No. 2077. Court of Appeals, District of Columbia, Frederick C. Robertson, Appellant, vs. Hugh H. Gordon, Marion Butler, Josiah M. Vale, Butler and Vale, Appellees. Petition for Appeal to the Supreme Court of the United States, from order and decree of March 1, 1910. Court of Appeals, District of Columbia. Filed Mar. 17, 1910. Henry W. Hodges, Clerk. Geo. H. Patrick, Petitioner's Attorney.

Court of Appeals for the District of Columbia, October Term, 1909.

No. 2077.

FREDERICK C. ROBERTSON, Appellant,  
vs.

HUGH H. GORDON, MARION BUTLER, and JOSIAH M. VALE, Individually and as Partners Under the Firm-name and Style of Butler and Vale, Appellees.

*Assignment of Errors on Appeal to United States Supreme Court.*

Comes now the appellant, Frederick C. Robertson, and files the following assignments of error upon which he will rely:

(1.) That it appears that, on the whole record, the decree of the Supreme Court of the District of Columbia of July 15, 1909, dismissing the bill of complaint, dissolving the injunction and entering judgment for costs against said appellant, Robertson, should have been reversed.

(2.) That the Court should have found in favor of the appellant, Robertson, and against the appellee, Gordon, as prayed in the bill of complaint.

(3.) The Court erred in affirming the said judgment and decree of the Supreme Court of the District of Columbia, and in imposing costs upon the appellant.

(4.) The Court erred in not finding that the contract in writing between the appellant Robertson and the appellee Gordon, dated March 28, 1906, set forth in the bill of complaint applied to the gross award of attorneys' fees made by the Court of Claims and paid by the Treasurer of the United States into the Supreme Court of the District of Columbia, as awarded to appellant, Robertson, and appellee, Gordon.

(5.) The Court erred in not finding, upon the record, that the appellant, Robertson, and the appellee, Gordon, were to share equally in the moneys awarded either and both of them by the Court of Claims, and impounded in this cause, after settling with other attorneys under contract, therefore made by appellee Gordon.

(6.) In finding that the appellant Robertson was estopped by the said decree of the Court of Claims from asserting his said claim against appellee Gordon, sued in this cause.

(7.) The Court erred in not finding that the appellee, Gordon, by his said agreement of March 28, 1906, was estopped to deny the written agreement sued on, as set forth in the bill of complaint and opinion of the Court, as the measure of the rights of appellant and appellee under the facts and circumstances of this case.

(8.) The Court erred in finding in favor of the appellee, Gordon, and against the appellant, Robertson, and in affirming the decree of the Supreme Court of the District of Columbia that the appellee, Gordon, be entitled to the sum decreed to him out of the fund herein.

(9.) The Court erred in holding that said appellant, Robertson, was actually or in legal effect a party to the suit in the Court of Claims in the name of Butler and Vale against the United States of America and the Indians on the Colville Reservation, and estopped or bound by the judgment and decree of said court in said cause.

(10.) The Court erred in not finding that the allegations of the bill of complaint were sustained by the entire record, and entitled appellant, Robertson, to the full relief prayed for.

(11.) The Court erred in not holding that the written agreement of March 28, 1906, sued on herein, could not be varied, altered or contradicted by oral testimony; and in failing to reverse the decree of the Supreme Court of the District of Columbia for not striking out but allowing any oral testimony offered on behalf of appellee, Gordon, to vary, alter or contradict the same.

March 14, 1910.

Respectfully submitted,

FREDERICK C. ROBERTSON,

*Appellant.*

By GEO. H. PATRICK, *His Attorney.*

(Endorsed:) No. 2077. Court of Appeals, District of Columbia. Frederick C. Robertson, Appellant, vs. Hugh H. Gordon, Marion Butler, Josiah M. Vale, Butler and Vale, Appellees. Assignment of Errors on appeal to the Supreme Court of the United States. Court of Appeals, District of Columbia. Filed Mar. 17, 1910. Henry W. Hodges, Clerk. Geo. H. Patrick, Appellant's Attorney.

### No. 2077.

FREDERICK C. ROBERTSON, *Appellant.*

vs.

HUGH H. GORDON, MARION BUTLER, and JOSIAH M. VALE, Individually and as Partners under the Firm Name and Style of Butler and Vale.

TUESDAY, April 5th, A. D. 1910.

On motion of Mr. Geo. H. Patrick, attorney for the appellant in the above entitled cause, It is ordered by the Court that said appellant be allowed an appeal to the Supreme Court of the United States, and the bond to act as supersedeas is fixed at the sum of fifteen hundred dollars.

(*Bond on Appeal.*)

Know all Men by these Presents, That we, Frederick C. Robertson, of Spokane, Washington, as principal, and The National Surety Company, of New York, as surety, are held and firmly bound unto Hugh H. Gordon, Marion Butler and Josiah M. Vale, individually, and as partners under the firm name and style of Butler and Vale, in the full and just sum of Fifteen Hundred dollars, to be paid to the said Hugh H. Gordon, Marion Butler and Josiah M. Vale, individually

and as partners under the firm name and style of Butler and Vale, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 5th day of April, in the year of our Lord one thousand nine hundred and ten.

Whereas, lately at a Court of Appeals of the District of Columbia to-wit: on March first, nineteen hundred and ten in a suit depending in said Court, between said Frederick C. Robertson and said Hugh H. Gordon, Marion Butler and Josiah M. Vale, individually and as partners under the firm name and style of Butler and Vale, a decree was rendered against the said Frederick C. Robertson and the said Frederick C. Robertson having prayed and obtained an appeal to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said Hugh H. Gordon, Marion Butler and Josiah M. Vale, individually and as partners under the firm name and style of Butler and Vale citing and admonishing each of them to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, That if the said Frederick C. Robertson shall prosecute said appeal to effect, and answer all damages and costs if he shall fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

FREDERICK C. ROBERTSON,	[SEAL.]
By GEO. H. PATRICK,	[SEAL.]
<i>His Atty. in Fact.</i>	

[Seal of National Surety Company.]

NATIONAL SURETY COMPANY,	[SEAL.]
By W. H. RONSAVILLE,	[SEAL.]
<i>Attorney in Fact.</i>	

Sealed and delivered in presence of—

N. S. FAUCETT,  
WILLIAM M. DEVINY.

Approved by—

SETH SHEPARD,  
*Chief Justice Court of Appeals  
of the District of Columbia.*

[Endorsed:] No. 2077. Frederick C. Robertson, Appellant, vs. Hugh H. Gordon, Marion Butler and Josiah M. Vale, individually and as partners under the firm name and style of Butler and Vale. Supersedeas bond on appeal to Supreme Court United States. Court of Appeals, District of Columbia. Filed Apr. 8, 1910. Henry W. Hodges, Clerk.

UNITED STATES OF AMERICA, ss:

To Hugh H. Gordon, Marion Butler, and Josiah M. Vale, individually and as Partners under the Firm Name and Style of Butler and Vale, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein Frederick C. Robertson is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard, Chief Justice of the Court of Appeals of the District of Columbia, this 8th day of April, in the year of our Lord one thousand nine hundred and ten.

SETH SHEPARD,  
*Chief Justice of the Court of Appeals  
of the District of Columbia.*

Service accepted this 8th day of April A. D. 1910.

JAMES B. ARCHER,  
*For Hugh H. Gordon.*  
CHARLES H. MERILLAT,  
*Atty., for Butler & Vale.*

[Endorsed:] Court of Appeals, District of Columbia. Filed Apr. 8, 1910. Henry W. Hodges, Clerk.

Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and type-written pages numbered from 1 to 207 inclusive contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Frederick C. Robertson, Appellant, vs. Hugh H. Gordon, Marion Butler and Josiah M. Vale, individually and as partners under the firm name and style of Butler and Vale, No. 2077, April Term, 1910, as the same remains upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 11th day of April, A. D. 1910.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,  
*Clerk of the Court of Appeals of the  
District of Columbia.*

## EXHIBIT A TO ORIGINAL ANSWER OF DEFENDANT H. H. GORDON.

Court of Claims of the United States.

No. 29526.

(Decided May 25, 1908.)

BUTLER AND VALE (Marion Butler &amp; Josiah M. Vale)

v.

THE UNITED STATES AND THE INDIANS RESIDING ON THE COLVILLE  
RESERVATION.

This case having been heard by the Court of Claims, the court upon the evidence makes the following

*Findings of Fact.*

## I.

By authority of the act of Congress approved June 21, 1903 (34 Stat. L., pp. 377-378), the claimants herein were authorized to bring suit in the Court of Claims for the purpose of determining the amount of compensation which shall be paid to the attorneys who have performed services as counsel on behalf of the Indians residing on the Colville Reservation in the prosecution of the claim of said Indians for payment for said land.

## II.

The Colville Indian Reservation was originally created by Executive order dated July 2, 1872, by the terms of which "the country bounded on the east and south by the Columbia River, on the west by the Okanogan River, and on the north by the British possessions, be, and the same is hereby, set apart as a reservation for said Indians, and for such other Indians as the Department of the Interior may see fit to locate thereon." The records of the Indian Office show that the Colville, Lake, San Poel, Okanogan, Spokane, and Cœur d'Alene and other tribes of Indians occupied and used, according to the Indian custom, the territory, which may be roughly described as bounded by the Bitter Root Mountains and the Kootenai River on the east, the Palouse River on the south, the Cascade Mountains on the west, and the British possessions on the north, from time dating, at least, as far back as 1857, and probably for generations back of that time. No treaty of cession had, however, been negotiated with said Indians for the territory described, and no diminished reservation had been provided for them until the date of said Executive order of July 2, 1872. The records of that office further show that the Okanogans, Lakes, and Colvilles occupied and claimed, according to Indian custom, different portions of the Colville Reservation as established by said Executive order.

By a clause contained in the Indian appropriation act approved August 19, 1890 (26 Stats., page 355), the President was authorized to appoint a commission to "negotiate with said Colville and other bands of Indians on said reservation for the cession of such portion of said reservation as said Indians may be willing to dispose of, that the same may be opened to white settlement."

In accordance with the aforesaid provision a commission was appointed which visited the Colville Indians and negotiated an agreement with them, dated May 9, 1891, which provided for the cession of the north half of their reservation, estimated to contain about 1,500,000 acres of land. For this cession it was agreed that the Indians should be paid \$1,500,000, to be paid to them in cash in five equal annual installments of \$300,000 each.

Congress, however, refused to accept and ratify said agreement and in lieu thereof passed the act of July 1, 1892, supra, which provided for the restoration of the north half of the reservation to the public domain "notwithstanding any Executive order or other proceeding whereby the same was set apart as a reservation for any Indians or bands of Indians," and it was further provided that "the same shall be open to settlement and entry by the proclamation of the President of the United States and shall be disposed of under the general laws applicable to the disposition of the public lands in the State of Washington."

The eighth section of said act declares "that nothing herein contained shall be construed as recognizing the title or ownership of said Indians to any part of the said Colville Reservation, whether that hereby restored to the public domain or that still reserved by the Government for their use and occupancy."

By the act of Congress approved February 20, 1896 (29 Stats., page 9), the north half of said reservation was opened to mineral entry and the same has been open under the mineral land laws since that date.

Under the provisions of a clause contained in the Indian appropriation act approved July 1, 1898 (30 Stats., page 593), "the mineral lands only in the Colville Indian Reservation in the State of Washington shall be subject to entry under the laws of the United States in relation to the entry of mineral lands." The effect of this provision, it will be observed, was to extend the mineral land laws over the south half, or the reserved portion, of the Colville Indian Reservation and to permit mineral locations to be made thereon.

The Colville Indians protested against the action of Congress in passing said act of July 1, 1892, and claimed that their lands should not be taken from them without the payment of the compensation stipulated for in the agreement referred to.

### III.

On May 12, 1894, the defendant Indians entered into a contract with Levi Maish and Hugh H. Gordon as follows:

*Contract Between the Several Tribes of Indians Resident upon the Colville Indian Reservation and Levi Maish, of Pennsylvania, and Hugh H. Gordon, of Georgia.*

This agreement, made and entered into by and between the San Puell Indians, through and by their agent, attorney, and representative, duly authorized and empowered by letters of attorney hereto attached and made part hereof; the Columbia Indians or Moses' Band, through and by Moses, their agent, attorney and representative, duly authorized and empowered by letters of attorney hereto attached and made part hereof; the Nez Perces Indians or Joseph's Band, through and by Joseph, their agent, attorney, and representative, duly authorized and empowered by letters of attorney hereto attached and made part hereof; the Okanagan Indians, through and by Martin Tonasket, their agent, attorney, and representative, duly authorized and empowered by letters of attorney hereto attached and made part hereof; the Colville Indians, through and by Barnaby, their agent, attorney, and representative, duly authorized and empowered by letters of attorney hereto attached and made part hereof, and the Lake Indians, through and by Bernard, their agent, attorney, and representative, duly authorized and empowered by letters of attorney hereto attached and made part hereof, parties of the first part, and Levi Maish, of Pennsylvania, and Hugh H. Gordon, of Georgia, attorney-at law, parties of the second part, witnesseth that: Whereas on the 9th day of May, 1891, an agreement was made and entered into by and between the United States Government, through its duly authorized Commissioners, on the one part and the Indians resident upon the said Colville Reservation, through their chiefs and a majority of the male Indians above the age of eighteen (18) years, on the other part; by which agreement the northern portion of said reservation was, upon certain terms and conditions, ceded, surrendered, and relinquished to the United States:

And whereas the principal consideration to said Indians for the cession and surrender of said portion of the reservation was the express agreement upon the part of the United States Government to pay to said Indians "the sum of one million five hundred thousand dollars (\$1,500,000) in five annual installments of three hundred thousand dollars (\$300,000), each with interest thereon at five per centum (5%);"

And whereas the United States Government has failed to comply with the terms of said agreement, and no provision has been made to pay said Indians the amount stipulated in the said agreement for the cession of said lands;

And whereas the said Indians entered into said agreement with an implicit trust in the good faith of the United States Government, and now most earnestly protest that their lands should not be taken from them without the payment of the just compensation stipulated in said agreement:

And whereas the said Indians, resident upon said reservation, are desirous of having their interests in said claim properly represented by counsel;

Now, therefore, in consideration of the foregoing, and in further consideration of the mutual covenants hereinafter specified, the said Indians, through their duly authorized agents, attorneys, and representatives, parties of the first part, and Levi Maish, of Pennsylvania, and Hugh H. Gordon, of Georgia, attorneys at law, parties of the second part, do hereby covenant and agree as follows:

First. The purpose of this agreement is to secure the presentation and prosecution of the claims of said Indians for payment for their interest in said ceded lands and to secure the services of said Maish and Gordon as counsel and attorneys for the prosecution and collection of said claims.

Second. The said Indians hereby employ and engage the said Maish and Gordon as their counsel and attorneys for the prosecution and collection of said claims against the United States Government; and the said Maish and Gordon hereby agree to act as attorneys and counsel for said Indians, and covenant that they will faithfully and diligently represent and urge the claims of the said Indians before the courts, the Departments of the Government, the Congress of the United States, or before any other tribunal which may take cognizance of said claims, and will do all in their power to see that justice is done to said Indians.

Third. In consideration of the foregoing covenants, and in consideration of the services to be rendered by said Maish and Gordon, the said Indians hereby agree to pay to said Maish and Gordon a sum equal to fifteen per centum (15%) of any money or sums of money which may be collected for said Indians under the provisions of this contract; and the said Indians hereby agree that the said Maish and Gordon shall be paid as compensation for their services the sum of fifteen per centum (15%) of any appropriation which may be made for the payment of said claims.

Fourth. In consideration of the compensation herein specified, the said Maish and Gordon are to take sole and absolute charge, direction, and control of the prosecution of said claims, and they are to pay all expenses which may be incurred by them in the prosecution of said claims; but they are not to be liable for any expenses incurred by said Indians, or by any one claiming to represent them, unless such expenses have been incurred under or in pursuance of the written directions or consent of said Maish and Gordon; nor shall any additional counsel be employed in this case without the written consent of said Maish and Gordon.

Fifth. It is hereby expressly agreed that the fee of fifteen per centum (15%) hereinbefore stipulated as the compensation of said Maish and Gordon for their services is to be paid to them in a separate and special warrant out of any appropriation which may be made for the payment of said claims or any part thereof, and the balance of said appropriation or appropriations is to be distributed per capita to the Indians who may be entitled thereto or expended for their benefit in such manner as Congress may direct.

It is distinctly understood and agreed that the payment of said fee to said Maish and Gordon is not to be delayed until the distribution of said appropriation or appropriations to the Indians who

may be entitled thereto, but the disbursing officers of the United States Government are hereby authorized to issue said separate and special warrant and pay to said Maish and Gordon the said fee of fifteen per centum (15%) as soon as any appropriation or appropriations for the payment of said claims are available.

It is further agreed that said Maish and Gordon are to be in no way responsible for or connected with the distribution of the balance of any funds which may be due and payable to said Indians, it being distinctly understood that the duties and obligations of said Maish and Gordon under this contract will be fully met and discharged, and their said compensation will be due and payable when and as soon as said appropriation or appropriations for the payment of said claims have been made.

Sixth. This contract is to continue in force for and during the term of ten (10) years from the date of its final execution and approval by the Commissioner of Indian Affairs and the Secretary of the Interior.

In witness whereof the said Indians, parties of the first part, through and by their said agents, attorneys, and representatives, have hereunto affixed their hands and seals at Colville Agency, Miles P. O., in the State of Washington, on the 12th day of May, A. D. 1894, and Levi Maish and Hugh H. Gordon, parties of the second part, have hereunto affixed their hands and seals at Washington, D. C., this —— day of ——, A. D. 1893.

THE COLUMBIA INDIANS, OR MOSES  
BAND,

[SEAL.]

By MOSES (his x mark).

*Representative, Agent, and Attorney.*

THE NEZ PERCE INDIANS, OR JOSEPH  
BAND,

[SEAL.]

By JOSEPH (his x mark).

*Representative, Agent, and Attorney.*

THE OKANAGAN INDIANS,

[SEAL.]

By MARTIN TONASKET (his x mark).

*Representative, Agent, and Attorney.*

THE COLVILLE INDIANS,

[SEAL.]

By BARNABY (his x mark).

*Representative, Agent, and Attorney.*

THE LAKE INDIANS,

[SEAL.]

By BERNARD ——.

*Representative, Agent, and Attorney.*

LEVI MAISH,  
HUGH H. GORDON.

Said contract was duly approved by the Commissioner of Indian Affairs on July 17, 1894, "on condition that the attorneys shall accept as full compensation for the services to be rendered thereunder the sum of 10 per cent of the amount or amounts they shall recover to the Indians thereunder," and on July 25, 1894, it was duly approved by the Secretary of the Interior on the same condition. As

thus approved the contract was accepted by said Maish & Gordon on January 20, 1899.

#### IV.

Levi Maish. After the approval of the Maish-Gordon contract said Maish, together with Hugh H. Gordon, began to confer with leading members of Congress and furnished them with facts and decisions of the courts in relation to the matter. The first attorney employed by them was Heber J. May, of Washington, D. C., whose services are hereinafter set forth, and with him prepared the first brief in the case. Said Maish died in February, 1899, and the record does not show what specific services he performed for the Indians other than those stated above.

#### V.

Hugh H. Gordon. In the years 1895, 1896, after the approval of the Maish-Gordon contract, said Gordon conferred with leading members of Congress and furnished them with facts and decisions of the court in relation to the matter, verbally employed Heber J. May, esq., of Washington, D. C., and together with him and said Maish prepared the first brief in the case. When the war with Spain was declared said Hugh H. Gordon was commissioned major and engineer officer and served as such in the United States and Cuba until after the close of hostilities, when he was discharged at his own request. In 1899 he made a contract with Heber J. May and Daniel B. Henderson, who subsequently brought in Marion Butler in the case. Afterwards said Gordon made an additional contract with said Butler. It appears that he had his father, the late ex-Senator Gordon, go to Washington and make an appeal in behalf of said Indians by interviewing a number of Senators and Representatives. Said Hugh H. Gordon again went to Washington just before the close of the session in which the appropriation was made and did effective service in securing that appropriation.

#### VI.

Heber J. May. In the year 1895 or 1896 said Maish and Gordon employed Heber J. May, attorney at law, Washington, D. C., to aid them in the prosecution of the claim. No written contract was made between them, but it was understood that he would be paid for his services in the matter. Afterwards a written agreement was entered into between said Maish and Gordon and said May on the subject of compensation.

It appears that said May prepared a bill for the relief of the Indians to confer jurisdiction upon the Court of Claims to determine the rights of Indians, but no action was taken on same.

#### VII.

Daniel B. Henderson. Said Henderson was general counsel for the Indian Protective Association. He entered into a contract with Hugh H. Gordon in the year 1900, in which it was agreed that he,

together with Heber J. May, should become associate attorneys of record for said Indians.

After frequent conferences with said May, extended through a period of the first two or three years, he familiarized himself with the history of the claim and the title of the Indians. He investigated the matter through the Indian Office, and in 1901 prepared a bill which was introduced in Congress, one or two bills having been by others previously presented. He entered into correspondence with the agent of the Colville Indians, Mr. A. M. Anderson, who, in 1902 or the early part of 1903, brought a delegation of the said Indians to Washington and learned through them a great deal about the history of the claim. Up to the year 1905 or 1906 he had representatives of the Colville Indians at his office during each session of Congress. In 1902 or 1903 Gen. J. B. Gordon came to Washington at his request and spent a week or ten days with said Henderson in the prosecution of the matter of the claim. In 1903 he became associated with Marion Butler, and from that time prosecuted the work of advancing the claim of the Indians jointly with him.

It appears that their efforts were directed up to the year 1905 to secure an act authorizing the Court of Claims to adjudicate the claim, after which they endeavored to secure a direct appropriation to the Indians.

### VIII.

Frederick C. Robertson, an attorney at law of Spokane, Wash., became interested in the matter of the claim of said Indians through the solicitation of Hugh H. Gordon under the Maish-Gordon contract in the latter part of 1903 or 1904, and when in the latter part of 1904 the Indians made a contract with E. C. McDonald he communicated said fact to said Gordon. In the early part of March, 1906, he went to Washington, D. C. He paid the expense of having Mr. Hugh Gordon come to Washington, and then for the first time met Vale and Butler and discussed the case with them, and with them undertook to map out such line of action as would conduce to establishing the rights of the Indians. He prepared a brief on the subject and saw the members of the conference committee and laid before them his views on the rights of said Indians. That he supplied Marion Butler from time to time with facts upon the matter.

It does not appear that said Robertson entered into any contract with anyone as to compensation for his services.

It appears that besides the services rendered in the month of March, 1906, in Washington, D. C., as aforesaid, said Robertson worked on the matter a year or more at Spokane.

### IX.

E. C. McDonald. On the 5th and 12th days of November, 1904, E. C. McDonald presented an alleged agreement with certain Indians by which it was agreed that said attorney was to be paid 10 per cent of any money or sums of money which might be collected for said Indians. Said agreement was not approved by the Secretary

of the Interior, and it is not shown to have been with the defendant Indians.

Thereafter said McDonald associated with him for the purposes of carrying out said agreement, Messrs. M. J. Gordon and R. W. Nuzum, attorneys of Spokane, assigning to them one-quarter interest each in the compensation mentioned in the aforesaid agreement and authorizing said associate counsel to employ additional counsel.

After a study of the history and law of the claim and after conferring with Judge Fullerton and frequent consultations with said associates he and his associates sent a delegation of three Indians in charge of A. M. Anderson to Washington, early in the year 1905, which delegation, together with said Gordon and Nuzum, remained at said place about three weeks conferring daily with Marion Butler and urging the matter before Congress.

With the exception of frequent consultations and interviews with Messrs. Gordon, Nuzum, and Robertson it does not appear that said McDonald rendered any further service in the case.

## X.

Merrit J. Gordon, an attorney at law of Spokane, Wash., in the early fall of 1904 was called in consultation with E. C. McDonald and R. W. Nuzum in Spokane and was asked by E. C. McDonald to cooperate with them in trying to secure an adjustment of the claim. He had some knowledge of the general situation of the matter growing out of his association when on the supreme bench of the State of Washington with the then Chief Justice Fullerton, who was the chairman of the commission which had been appointed by the President, pursuant to the Indian appropriation act of 1892, to deal with said Indians with reference to the ceding of such of their lands as might be wanted by the Government and agreeing upon a price and naturally learned considerable from him as to the merits of the claim. Shortly after said consultation he went to Olympia, which resulted in Judge Fullerton writing a letter setting forth his views in the matter and also such facts and circumstances pertinent to the subject. He went thereafter to Washington, D. C., with R. W. Nuzum, together with a delegation of three of said Indians, the expenses of said Indians being paid by said Gordon and Nuzum, where they remained about three weeks conferring with Marion Butler and presenting the matter to Congress. They prepared a brief on the claim which they furnished to the various members of the Senate Committee on Indian Affairs. On different occasions he called the attention of different members of that committee to specific decisions and to certain references as to records in the Office of the Commissioner of Indian Affairs or the Secretary of the Interior. Considerable effort was made by them to get a hearing before the committee and finally on February 8, 1905, they get a hearing before the full committee of the Senate on the Indian appropriation bill, after which he left Washington and returned to Spokane.

In December, 1905, said Gordon again went to Washington, D. C., where he remained four weeks, during which time he conferred

with different Senators, but was unable to get a hearing before the committee and since which time he has rendered no further service to said Indians other than advising with his associates from time to time.

The services so rendered were cumulative, the information furnished and labor performed had all been anticipated, and full argument and presentation of them fully made to the committee as aforesaid.

## XI.

**Richard W. Nuzum.** In December, 1904, or January, 1905, said Richard W. Nuzum, attorney at law, of Spokane, Wash., became associated with said McDonald in the prosecution of the claim of said Indians, said McDonald assigning to him one-fourth interest in the compensation mentioned in the alleged agreement with the Indians of November 5 and 12, 1904.

After an investigation to some extent of the law of the case said Nuzum, together with M. J. Gordon, went to Washington, D. C., in January, 1905, where arrangements were made with the firm of Butler & Vale to cooperate with them in presenting the matter to Congress. After consultations with said Butler and Vale and interviews with various Senators, furnishing them with copies of a brief, a hearing was had before the Senate committee on February 8, 1905, at which M. J. Gordon and Marion Butler made the arguments, said hearing lasting two hours. Said Nuzum returned to Spokane, leaving Washington February 15, 1905.

In March, 1906, said Nuzum, in company with F. C. Robertson, again went to Washington, where he remained about three weeks, consulting with Messrs. Butler and Vale and interviewing various Senators and Representatives, making effort to get a hearing before the committee, and while there it appears he entered into a contract with said Butler as to compensation. Said contract was only partly in writing.

The time consumed by said Nuzum in going to and returning from Washington, together with the time he remained at said place, was four or five weeks each trip.

Claimant was never employed by defendant Indians; had no connection with the prosecution of the claim under the Maish and Gordon contract, and the services rendered were cumulative.

## XII.

**A. M. Anderson,** by occupation a right of way agent, arranged the agreement of November 5 and 12, 1904, with said McDonald, and thereafter at the request of said McDonald accompanied a delegation consisting of three Indians to Washington, D. C., remaining there about one month. The expenses of said Anderson and the Indians of said trip were paid by Messrs. Gordon, McDonald, and Nuzum.

It does not appear that said Anderson had any agreement with said McDonald or the defendant Indians for his services, in writing or otherwise, nor does it appear that he rendered any services with respect to the prosecution of said claim.

## XIII.

Marion Butler, attorney at law, first came into said case through employment by Henderson, May, and Hugh H. Gordon about the year 1902 or 1903. He at once proceeded to prepare a bill for the relief of said Indians, which was introduced in the Senate in a modified form. The Committee on Indian Affairs of the Senate held the view that the Indians had no title in said lands, and said Butler prepared a brief on the question of such title, which was presented to said committee, but no action was taken at that session of Congress.

At the next session said Butler prepared another bill providing for conferring upon the Court of Claims jurisdiction to hear and determine the claim of the said Indians and appeared before said Committee on Indian Affairs of the Senate several times and made arguments in support of same, but no action was taken.

In 1904 another bill substantially the same was introduced in the Senate and Butler appeared before the committee and made one or more arguments on the question of the title of the Indians, but failed to get a favorable report on same.

After the expiration of the Maish-Gordon contract in 1904 said Butler again appeared before said committee and stated that he wished to continue in the prosecution of the claim on a quantum meruit, and at the same time made an argument on the question as to whether the decision in the Lone Wolf case, that the Indians had no redress in the courts, was applicable to this claim, but no action was taken at that session of Congress.

In 1905, Fifty-eighth Congress, third session, said Butler had introduced in the Senate a bill for the relief of the Indians, providing for the recognition of their title and setting aside to their credit in the Treasury of the United States the sum of \$1,500,000, as provided by agreement. This bill or provision was introduced in the form of a proposed amendment to the Indian appropriation bill and he appeared before the subcommittee in support of said amendment and made arguments on several occasions. Said amendment, slightly modified, was placed upon the appropriation bill and passed by the Senate, but the House of Representatives failed to concur in the amendment.

At the next session said Butler prepared another amendment to the same effect, which was introduced in the Senate, after which he appeared before the committee several times in support of same, filing a printed brief reviewing the case, explaining objections, and giving information to the committee, resulting in a favorable report and adoption in the Senate and passed, but was again disagreed to in the House.

Thereafter said Butler appeared before the committees of the House and Senate in conference on said measure, presenting the two briefs heretofore mentioned, making three oral arguments and furnishing other information, after which a favorable report was made and the provision became a law.

## XIV.

Josiah M. Vale. Said Vale became associated with Marion Butler in the case in the year 1903, after which said attorneys formed a co-partnership. Said Vale appeared before the subcommittee having charge of the matter and made an argument in support of same and since the time when said partnership was formed has constantly conferred with Butler with reference to the case, and his services have been of the same continuous nature up to the time of the passage of the act of June 21, 1906.

## XV.

Richard D. Gwydir, J. W. Edwards, and Wendell Hall, on the 15th day of June, 1894, entered into a written contract with said Maish and Gordon for services in attending to the signing and execution of a contract between said Maish and Gordon and the Indians resident on the Colville Reservation in which it was agreed that said Gwydir, Edwards, and Hall should have \$30,000 (\$10,000 each), provided that said Maish and Gordon should recover the full amount of the claim and receive as their compensation 15 per cent thereof. It was further agreed that in case they should not recover the full amount of the claim, or in case the commission paid them should be reduced below 15 per cent, the amount to be paid to said Gwydir, Edwards, and Hall should be reduced in the same proportion, but in any event they should receive six forty-fifths of the fee paid to said Maish and Gordon to be divided equally between them.

It does not appear that said contract was ever presented to, or approved by, the Secretary of the Interior.

Said Gwydir, Edwards, and Hall rendered certain services to said Maish and Gordon in procuring signatures of the Indians to the contract of May 12, 1894, but it does not appear that they rendered service to the Indians.

## XVI.

Samuel L. Magee. On March 21, 1894, said Samuel L. Magee entered into a written contract with Wendell Hall representing said Maish and Gordon as follows:

"DAISY, March 21, 1894.

"On behalf of Maish and Gordon I hereby agree that said Samuel L. Magee shall receive \$1,000 from money that they may receive as contingent fee for obtaining for the Colville Indians money due them for ceding their reservation.

"WENDELL HALL."

Said contract was never presented to the Secretary of the Interior for approval.

Said Magee rendered no service to said Indians and what service he rendered to Maish and Gordon, if any, does not appear.

## XVII.

In the year 1872, at the time the President was considering the propriety of setting aside said reservation, the Department of the In-

terior forwarded to him the map prepared by Governor Stevens, verified and confirmed by the Superintendent of Indian Affairs for Washington, showing that the defendant Indians possessed the ordinary Indian title to the lands out of which the Colville Reservation was afterwards carved by Executive order of July 2, 1872.

March 25, 1899, in answer to a request from the Attorney-General, the Commissioner of Indian Affairs made a report which enters into the question of the title of the Indians to the lands embraced in the Colville Reservation and cites as authority the Stevens map above referred to, the case of *In re Wilson* (140 U. S., 575) and numerous other authorities. It also discusses the unfavorable report of Senator Manderson and endeavors to show that the Indians had a valid title to the lands which they occupied. This report was transmitted to the Attorney-General, with two copies of the Stevens map, by a letter of the Secretary of the Interior, dated March 28, 1897, for use in the case of the United States v. Four Bottles of Whisky. There were afterwards numerous reports by the Indian Office to the Secretary of the Interior upon the question of the title of the Indians to these lands.

The Department of the Interior, on Senate bill No. 5293, introduced in the Senate March 28, 1904, reported favorably and again reviewed the title of the Indians to the lands embraced in the Colville Reservation, and inclosed a copy of the letter of March 25, 1899, above referred to.

On December 16, 1905, an agreement was entered into between the United States and the Colville and other bands of Indians residing on the Colville Reservation by which the Indians agreed to the opening up of the south half of their reservation for settlement, and the United States agreed, as a part consideration therefor, that the Indians should also be paid for the north half of their reservation \$1,500,000, opened up for settlement under the agreement of May 9, 1891. The cession of the lands for settlement was accepted by the Government by the act of March 22, 1906 (34 Stat. L., 80-82), but instead of ratifying that part of the agreement which proposed payment for the north half of their reservation Congress ratified the agreement of May 9, 1891, by the act of June 21, 1906.

The report of the Senate Committee on Indian Affairs states that their action was taken in consequence of the efforts of the Commissioner of Indian Affairs and the Secretary of the Interior in behalf of the defendant Indians.

#### *Conclusion of Law.*

Upon the foregoing findings of facts the court decides, as a conclusion of law, that claimants be awarded judgment as follows:

Benjamin Miller, administrator of the estate of Levi Maish, deceased, the sum of six thousand dollars (\$6,000).

Hugh H. Gordon, the sum of fourteen thousand dollars (\$14,000).

Marion Butler, the sum of twenty thousand dollars (\$20,000).

Josiah Vale, the sum of ten thousand dollars (\$10,000).

Daniel B. Henderson, the sum of five thousand dollars (\$5,000).

Heber J. May, the sum of three thousand dollars (\$3,000).  
Frederick C. Robertson, the sum of two thousand dollars (\$2,000).

*Opinion.*

BOOTH, J., delivered the opinion of the court.

This is a suit under a special jurisdictional act to recover attorney fees. The services alleged were performed in the prosecution of the claim of the Colville Indians against the United States, and were confined exclusively to the committees of Congress. The Colville Indians occupied a reservation set aside to them by Executive order in the northeastern part of the State of Washington. By an act of Congress approved August 19, 1890 (26 Stat. L., 355), the President appointed a commission to treat with said Indians respecting the cession of a portion of said reservation to the United States. On May 9, 1891, the commission consummated an agreement with the Indians; it provided for the cession of the entire north half of their reservation to the United States. The area of lands so ceded was estimated at 1,500,000 acres, and as a part consideration therefor the United States agreed to place as a trust fund to their credit in the Treasury the sum of \$1,500,000, bearing interest annually at the rate of 5 per cent.

In pursuance of the above agreement the lands so ceded were by act of Congress thrown open to public settlement; but no appropriation of money was made, and that part of the agreement providing for its payment was never complied with until the passage of the act of June 21, 1905. The Indians became anxious, and justly, quite solicitous. Their appeals to the Congress subsequent to their agreement was met in 1892 by an adverse report from the Senate Committee on Indian Affairs, in which their right to compensation as per agreement was directly challenged by a most positive denial of their title to the lands in question.

In May, 1894, the said Colville Indians entered into a contract with Levi Maish, of Pennsylvania, and Hugh H. Gordon, of Georgia, attorneys and counselors at law, by the terms of which the said attorneys were to prosecute their said claim against the United States and receive as compensation therefor 15 per cent of whatever amount they might recover. This contract was subsequently approved for 10 per cent, as the law required, by the Secretary of the Interior, and extended for a period of ten years only. It is the sole and only contract ever executed by said Indians respecting said claim. It is likewise the only legal authority whereby any attorney appeared for said Indians during its operation; in fact, all with the possible exception of two claimants herein rendered services under their contract, and those who did not appear thereunder were without any authority whatever to appear for said Indians at any time or place. Nothing was accomplished for the Indians under the Maish-Gordon contract. Notwithstanding its expiration, however, a number of attorneys claim to have rendered efficient services, and to have accomplished, by the permission and authority of

the Congress and the committees thereof, the final compliance with the agreement of 1891 and secured by the act of June 21, 1906, an appropriation covering the money consideration mentioned in said agreement. In the same act making said appropriation appears the jurisdictional statute whereby said claimants appeared and filed their petitions in this court. The language of the act is as follows:

"Jurisdiction is hereby conferred upon the Court of Claims to hear, determine, and render final judgment in the name of Butler and Vale (Marion Butler and Josiah M. Vale), attorneys and counselors at law, of the city of Washington, District of Columbia, for the amount of compensation which shall be paid to the attorneys who have performed services as counsel on behalf of said Indians in the prosecution of the claim of said Indians for payment for said land, and in determining the amount of compensation for such services the court may consider all contracts or agreements heretofore entered into by said Indians with attorneys who have represented them in the prosecution of said claim, and also all services rendered by said attorneys for said Indians in the matter of said claim. Petition hereunder shall be filed in said court by the said attorneys (Butler and Vale), within thirty days from the passage of this act, and the Attorney-General shall appear on behalf of the defendants, and said cause shall be given preference for immediate hearing in said court, and the Secretary of the Treasury is hereby authorized and directed to pay the sum of money so awarded by said court to the said attorneys (Butler and Vale), upon the rendition of final judgment, out of the said sum herein set apart or appropriated for the benefit of said Indians, and payment of said judgment shall be in full compensation to all attorneys who have rendered services to said Indians in the matter of their said claim, the same to be apportioned among said attorneys by said Butler and Vale as agreed among themselves: Provided, That before any money is paid to any attorney having an agreement with Butler and Vale as to the distribution of said fees, each of the same shall execute and deliver to the Secretary of the Interior a satisfaction and discharge of all claims and demands for services rendered said Indians in the matter of their said claims."

On June 26, 1906, Butler and Vale filed in this court, in pursuance of the foregoing statute, their petition herein, seeking to recover the sum of \$225,000. The allegations of the petition follow the jurisdictional act and especially assert the right of prosecution and recovery of judgment to be in said petitioners in strict accordance therewith. Subsequent to the filing of said petition, six intervening petitions were filed, in each of which there appears an express disclaimer of any valid agreement respecting the distribution of any sum recoverable under the statute, and asserting the right of prosecution and recovery herein, alleging the performance of professional services as contemplated by the statute, and expressly praying for the rendition of individual judgments as respects the distribution of any fund recovered under the law. Motions to dismiss said intervening petitions were duly filed by Butler and Vale, and the entire controversy, including said motions, was, by order of

court, consolidated, heard together, and will be disposed of as one cause.

The language of the jurisdictional statute indicates its enactment in pursuance of a preexisting state of affairs between the claimants, and especially as concerns a previous agreement among the attorneys concerned, as to the distribution of any fees recovered thereunder. The words "the same to be apportioned among said attorneys by said Butler and Vale as agreed among themselves" can have no other import. The statute was undoubtedly enacted with these special limitations and conditions upon information then before the Congress that some arrangement existed whereby the total sum recoverable under the law should be distributed by a fixed and determined agreement, leaving no discretion to the distributees, and limiting the court to the ascertainment of the amount only. It is apparent that the Congress was not endeavoring to deprive this court of its power and authority over its own judgments and decrees. The Congress never intended to confer upon Butler and Vale that degree of judicial authority and power which would enable them to distribute a judgment of this court in which they were interested as parties litigant upon their own discretion; to have so enacted would have been a senseless and meaningless proceeding, obnoxious to the law, and devoid of justice. (*Pam To Pee v. United States*, 187 U. S., 371-382, 383.)

This portion of the statute is directory; it was designed for convenience and simplicity; to avoid a multiplicity of suits; and purposed to conclude the rights of the claimants under presupposed agreement with respect to the same. This construction of the statute is sustained by reference to the context of the whole act. The proviso likewise circumscribes the authority of Butler and Vale as to distribution of the funds, and expressly withdraws payment of any sum so directed by them until final receipts by the distributees have been executed and filed with the Secretary of the Interior in accordance with a supposed valid and existing agreement with respect to the same. Courts being exceedingly reluctant to withhold jurisdiction where the same can be reasonably inferred to exist from the language and intent of a jurisdictional statute, will not deny redress to suitors because a portion of the statute may fail, if sufficient remains upon which to predicate the relief intended. (*Supervisors v. Stanley*, 105 U. S., 305.)

While it is true special statutory jurisdiction and remedies are not to be extended by construction beyond a fair import of the legislative grant, yet it has long been the law that doubts may be solved in favor of jurisdiction unless some established law is violated. We are not unmindful of the authority of the Congress to prescribe rules by which a particular case or class of cases over which this court is given jurisdiction shall be determined. No doubt exists that jurisdiction is strictly limited to the prescribed terms of the statute. This court has never held otherwise. There is nothing, however, in the special jurisdictional statute now under consideration which by express language curtails the judicial functions of the court, and proscribes an exercise of that inherent power lodged in all judicial

tribunals to give effect to the legislative intent, and otherwise construe a statute ambiguous upon its face, and by the very existence of which the machinery of the court is set in motion. (Enlich on Statutory Construction, sec. 430.)

The objection does not extend to the subject-matter of the statute, or in any wise affect the substantive rights of the parties. It can at most simply affect a mode of procedure, a subject secondary in importance to the real object, purpose, and scope of the act. (Liverpool Bank v. Turner, 30 L. J. Ch., 380.)

The statute having simply recited a supposed agreement, the language being "as agreed among themselves," is of itself quite indefinite. Whether it was oral or under seal likewise failed to appear, until the same was produced in this court, by its special order, and only then under protest. The parties thereto, the terms thereof, were never revealed to certain of the interveners until the production of the instrument in this court at the trial of this cause. To require of this court the adjudication and determination of a cause involving a claim of \$225,000, and place whatever judgment it might render, to be distributed according to an alleged agreement which it might never have seen, would entail results so absurd in their consequences, so at variance with well-recognized rules of legal procedure and established precedents as to render such an act, standing alone, absolutely void. The Congress never intended such results, and even if so intended subsequent events have proven that the information attending the enactment of the statute did not fully embrace the entire history of the subject-matter of the legislation, and that the Congress so anticipated will appear hereafter.

If it were otherwise this case must fail. The intervening petitions expressly repudiate the existence of an agreement of distribution. The findings show that some at least of the interveners were not parties to the alleged agreement at all. The court's conclusion shows the absence of any such agreement as the statute contemplated to exist.

That particular direction contained in the statute is incapable of enforcement and, unless we can find authority to proceed aside from it, the petition would be dismissed. The Congress had before it at the time of the enactment of the statute a claim against the Colville Indians for services rendered by certain attorneys. It recognized the justice of such a claim. The legal authority under which said attorneys had previously appeared had expired; they were relegated entirely to special legislation for relief. The Congress granted the relief, the special statute was passed, and notwithstanding the reference to an agreement as to distribution of the judgment the general language of the whole statute is sufficiently comprehensive to embrace, as it was clearly intended to do, the claims of "all attorneys who have rendered services to said Indians in the matter of their said claim." No intention appears to limit the adjudication to persons signatory to the agreement mentioned. The adjudication intended was to include and cover the whole transaction. The jurisdiction granted extended to the entire scope of the subject-matter referred, and to all parties interested therein.

While the jurisdictional statute contains many inconsistencies and

upon its face is decidedly ambiguous, still it is not so worded as to prevent the elimination of meaningless and nonenforceable clauses and leave sufficient authority upon which the court can adjudicate and determine the real controversy. However, in following the conclusions set forth above, we are confronted with another contention, put forth by the defendants. The findings disclose that the only valid contract between the Indians and any attorney or attorneys had expired. The prosecution of their claim subsequent to May 12, 1904, was entirely without authority; claimants were volunteers, and the question arises, Does the jurisdictional statute repeal pro tanto section 2103, R. S.; or, is the question of a legal liability to pay attorneys' fees regulated by the act to this court? In any event, can there be a recovery in the absence of a valid contract of employment? In the case of *Lone Wolf v. Hitchcock* (187 U. S., 553) the plenary power of the Congress over Indian tribes and Indian property was decided. The question of authority to create a liability for the payment of an obligation upon the part of Indian tribes by the Congress is now at rest. While the jurisdictional act does not create a positive liability, it does confer judicial power and authority upon this court to ascertain the question of liability, and enforce the same, if any such is found to exist. The court is vested with discretion as to consideration of contracts of employment in ascertaining the extent of compensation, and the silence of the statute with respect to any statutory agreements clearly indicates a legislative intention to refer the whole matter to this court for adjudication and determination, irrespective of section 2103, R. S. If it were not intended to repeal pro tanto section 2103, R. S., the passage of the jurisdictional statute was unnecessary. Section 2103 provides as follows:

"SEC. 2103. No agreement shall be made by any person with any tribe of Indians, or individual Indians not citizens of the United States, for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands, or to any claims growing out of, or in reference to, annuities, installments, or other moneys, claims, demands, or thing, under laws or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States, unless such contract or agreement be executed and approved as follows:

"First. Such agreement shall be in writing, and a duplicate of it delivered to each party.

"Second. It shall be executed before a judge of a court of record, and bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it.

"Third. It shall contain the names of all parties in interest, their residence and occupation; and if made with a tribe, by their tribal authorities, the scope of authority and the reason for exercising that authority shall be given specifically.

"Fourth. It shall state the time when and place where made, the particular purpose for which made, the special thing or things to be done under it, and, if for the collection of money, the basis of the

claim, the source from which it is to be collected, the disposition to be made of it when collected, the amount or rate per centum of the fee in all cases; and if any contingent matter or condition constitutes a part of the contract or agreement, it shall be specifically set forth.

"Fifth. It shall have a fixed limited time to run, which shall be distinctly stated.

"Sixth. The judge before whom such contract or agreement is executed shall certify officially the time when and place where such contract or agreement was executed, and that it was in his presence, and who are the interested parties thereto, as stated to him at the time; the parties present making the same; the source and extent of authority claimed at the time by the contracting parties to make the contract or agreement, and whether made in person or by agent or attorney of either party or parties."

"All contracts or agreements made in violation of this section shall be null and void, and all money or other thing of value paid to any person by any Indian or tribe, or any one else, for or on his or their behalf, on account of such services, in excess of the amount approved by the Commissioner and Secretary for such services, may be recovered by suit in the name of the United States in any court of the United States, regardless of the amount in controversy; and one-half thereof shall be paid to the person suing for the same, and the other half shall be paid into the Treasury for the use of the Indian or tribe by or for whom it was so paid."

It will be observed that under the provisions of this statute resort to the courts and further legislation is unnecessary to obtain payment of fees as therein provided. In *United States v. Crawford* (47 Fed. Rep., 569) the court in construing a statute directly contrary to section 2103, R. S., and wherein the question of compensation for services to an Indian tribe was involved, held, that as to the special matter embraced within the jurisdictional statute, it was a repeal pro tanto of section 2103, R. S. It is quite true that repeals by implication are not favored in law. Yet absolute inconsistent provisions in two statutes wherein the later covers the whole subject-matter of the earlier statute and is repugnant thereto, must be intended to repeal the earlier statute. In view of the facts and circumstances surrounding the enactment of the jurisdictional statute here questioned, we can not hold otherwise than that the Congress intended to reward claimants, if entitled to reward, upon the basis of a quantum meruit. (9 Decisions of the Comptroller, 264.) The legislative body, vested with supreme and absolute authority in the premises, recognized the existence of a claim against the defendants, and, sweeping aside all legal impediments to its assertion, afforded them a forum and a jurisdiction to hear, adjudicate, and determine their cause. The Congress have frequently so legislated: very recently, in the Watson Stewart case (43 C. Cls. R. —).

The contracts in the record, both those dealing with employment of attorneys, and the one respecting the division and distribution of any sum recovered among claimants, have been used as evidence. The contention so earnestly urged by a portion of the claimants respecting the binding force of the contract of distribution can

not be sustained; the instrument is valuable as indicating the amount counsel signatory thereto were willing to accept, and likewise their proportionate share thereof; but it can not conclude the court in either respect, much less the defendant Indians who were never parties thereto. The instrument upon its face indicates its execution in anticipation of immediate appropriation by the Congress of the sum claimed as attorney fees, and does not embrace the claims of certain interveners under the jurisdictional statute. The court is at present considering a claim asserted against the Colville Indians. Any sum allowed is deducted from their trust funds and decreases proportionately their distributive share thereof. In arriving at the amount due and the distribution thereof the defendant Indians are entitled to consideration, and to know by what authority and in what manner their property has been disposed of. Congress could not have intended to limit and constrain, thereby prejudging the value of services to individuals, by requiring us to give certain claimants under the jurisdictional act a fixed pro rata share of the judgment of this court irrespective of the testimony on the record. The Attorney-General is by the express terms of the statute directed to appear for the Indian defendants; and if the defense so commanded is to be circumscribed in its extent and embraces no right to challenge the justice of the claim, both in respect to the total amount claimed and individual distribution of the same, it would be perfunctory in character, and impose the performance of a well-nigh meaningless act. If the court should find some one party to this agreement entitled to no allowance, it would necessarily increase the amount to those allowed. If the testimony indicated the justness of a decreased allowance to one of the parties thereto it would deprive the court of power to execute its judgment. In fact the instrument invades the judicial power of the court. It submits an issue in nowise justiciable, is *ex parte* as respects the defendants, and, however extensive in morals as respects the assertion of claims in contravention thereto, has no standing in the present controversy which this court is obliged to respect.

No positive rule can be invoked as to the amount allowable to attorneys as fees for professional services; the quantum depends in each case upon the particular circumstances surrounding the transaction. Courts are not in any wise loath to decree ample compensation to those engaged in the prosecution and management of important controversies involving personal rights and private property, with respect to Indian rights and Indian property courts would be exceedingly reluctant in their duty if they failed to guard with jealous scrutiny the property of these dependent people. Claims asserted against their trust funds will not be unduly extended beyond the preponderance of testimony establishing the same; and while valid contracts are always enforceable both in law and equity, the court, in the absence of any such contracts, will predicate its judgment under the jurisdictional statute upon what the testimony in the record shows to be a fair and reasonable compensation for the services performed, keeping in mind the results accomplished and the quantum of property restored. Of course, contingent con-

tracts of employment are entitled to full consideration where, as in this case, they are properly entered into, and the court will not fail to consider this feature of the case at bar.

It appears from the findings that the defendant Indians employed two attorneys to prosecute their claim; they fully expected, in the event of success, to reward said attorneys as the contract expressed, and had the subject-matter of employment terminated successfully during the existence of the contract, the expense incident thereto would have been fixed and determined. Nothing appears in this record to show that had the same degree of labor and vigilance been continuously manifested during the earlier period of the contract's existence, the results finally accomplished might not have been accomplished without the appearance of numerous additional attorneys and the incurrence of increased expense. It is apparent from the record that the claim now asserted, except as to a few claimants, had its inception in the Maish and Gordon contract, claimants agreeing with said attorneys to the contract to assist them in the prosecution of the claim therein mentioned, for a certain percentage of the fee allowed by its terms. We have now, as a result of the expiration of the Maish and Gordon contract, the claims of fourteen petitioners, each of whom alleges the performance of extensive labor and important contributions to the final result. The compensation asked for has increased to \$225,000. That the defendant Indians ever contemplated such expense is incredible. That the prosecution of their claim required such an array of counsel is equally as incredible.

Much of the labor was coextensive and cumulative, especially so after the preparation of the brief by Marion Butler and his oral presentation of the cause to the committees of the Senate. The claimants who first appeared under the so-called McDonald contract added little that had not already been said and done prior to their appearance; their services were wholly cumulative and in most respects unnecessary. The issue involved, while quite momentous, was equally as simple; it was direct and apparent, and when the history of the case had been fully brought forth and the law applicable thereto stated in brief and arguments, it is inconceivable how its repetition by numerous attorneys could materially aid in the final determination of the cause. That they performed some service will not be denied; the service contemplated, however, is not mere manual labor, but effective and resultant service, that which did or tended toward the accomplishment of the appropriation. Their coming into the case, and the circumstances under which they came, not having been employed by the Indian defendants, and claiming a right to appear by virtue of contract never approved by the Secretary of the Interior, all suggest a voluntary projection of themselves upon the defendants at a time when their services were not indispensable and could not have materially assisted in the final disposition of the claim. The preparation of the case had been concluded, the briefs filed, the law examined, arguments made, and nearly, if not quite, all steps necessary to secure Congressional action been taken prior to their appearance. The court under these

circumstances is not disposed to appropriate any portion of the defendants' property in payment of fees to these claimants.

The claims of Richard D. Gwy-ir, James W. Edwards, A. M. Anderson, Samuel L. Magee, and Wendell Hall have likewise been dismissed; they have absolutely no claim against the defendants. What, if any, service was rendered by the Indian Protective Association does not appear, and no allowance is made therefor.

The court, after full consideration of the subject-matter, taking into account the attitude of and the valuable assistance rendered by the Department of the Interior, makes the following allowances:

To Benjamin Miller, administrator of the estate of Levi Maish, deceased.....	\$6,000
To Hugh H. Gordon.....	14,000
To Marion Butler.....	20,000
To Josiah Vale.....	10,000
To Daniel B. Henderson.....	5,000
To Heber J. May.....	3,000
To Frederick C. Robertson.....	2,000

Motion for new trial filed herein will be overruled and judgment awarded the claimants as set forth above. All other petitions and intervening petitions are dismissed.

Howry, J., was absent and took no part in this case.

### In the Court of Claims.

BUTLER & VALE (Marion Butler & Josiah M. Vale), Attorneys and Counsellors at Law, of the City of Washington, D. C.,

v.

THE UNITED STATES, THE UNITED STATES, Trustee for the Indians Residing on the Colville Reservation, and The Indians Residing on the Colville Reservation Known as the Colville Indians,

No. 29526.

Filed June 26, 1906.

### Petition.

To the Honorable the Chief Justice and Associate Judges of the Court of Claims:

### I.

Your petitioners, Marion Butler and Josiah M. Vale, under the style and firm name of Butler & Vale, attorneys and counsellors at law, of the City of Washington, D. C., respectfully represent that they are the identical persons named in a certain Act of Congress, being public No. 258, approved on the 21st day of June, 1906, and that they bring this suit under the authority of said act, wherein it is provided as follows:

"To carry into effect the agreement bearing date May ninth, eighteen hundred and ninety one, entered into between Indians residing on the Colville Reservation and commissioners appointed by the President of the United States under authority of the Act of Congress approved August nineteenth, eighteen hundred and ninety, to negotiate with the Colville and other bands of Indians on said Colville Reservation for the cession of such portion of said reservation as said Indians might be willing to dispose of, there shall be set aside and held in the Treasury of the United States for the use and benefit of said Indians, which shall at all times be subject to the appropriation of Congress and payment to said Indians, in full payment for one million five hundred thousand acres of land opened to settlement by the Act of Congress. 'To provide for the opening of a part of the Colville Reservation, in the State of Washington, and for other purposes,' approved July first, eighteen hundred and ninety-two, the sum of one million five hundred thousand dollars, and jurisdiction is hereby conferred upon the Court of Claims to hear, determine and render final judgment in the name of Butler and Vale (Marion Butler and Josiah M. Vale), attorneys and counsellors at law, of the City of Washington, District of Columbia, for the amount of compensation which shall be paid to the attorneys who have performed services as counsel on behalf of said Indians in the prosecution of the claim of said Indians for payment for said land, and in determining the amount of compensation for such services the court may consider all contracts or agreements heretofore entered into by said Indians with attorneys who have represented them in the prosecution of said claim, and also all services rendered by said attorneys for said Indians in the matter of said claim. Petition hereunder shall be filed in said court by the said attorneys (Butler and Vale) within thirty days from the passage of this Act, and the Attorney-General shall appear on behalf of the defendants, and said cause shall be given preference for immediate hearing in said Court, and the Secretary of the Treasury is hereby authorized and directed to pay the sum of money so awarded by said Court to the said attorneys (Butler and Vale), upon the rendition of final judgment, out of the said sum herein set apart or appropriated for the benefit of said Indians, and payment of said judgment shall be in full compensation to all attorneys who have rendered services to said Indians in the matter of their said claim, the same to be apportioned among said attorneys by said Butler and Vale as agreed among themselves: Provided, That before any money is paid to any attorney having an agreement with Butler and Vale as to the distribution of said fees, each of the same shall execute and deliver to the Secretary of the Interior a satisfaction and discharge of all claims and demands for services rendered said Indians in the matter of their said claim."

And petitioners further say that the United States is sued in its own right, the same being the custodian of the money set apart and appropriated under said act of Congress; the United States is also sued as trustee for the Indians residing on the Colville Reservation, and the Indians residing on the Colville Reservation, known as the

Colville Indians, are sued in their own right under the authority of said act of Congress.

## II.

Petitioners further state that prior to August 19, 1890, the Colville Indians, who are the Indians named in the act of Congress set out in paragraph 1 hereof, and described therein as Indians residing on the Colville Reservation and as "The Colville and other bands of Indians on said Colville Reservation," occupied a Reservation in the north-eastern part of the State of Washington which had been set aside for their use and occupation by executive order; that under authority of an act of Congress approved August 19, 1890 (26 Stats., 355) the President of the United States appointed a Commission to treat with the said Indians for cession of a part of that reservation, with the result that an agreement was entered into with said Indians under date of May 9, 1891, which provided for the cession of the north half of said reservation, estimated to contain one million five hundred thousand (1,500,000) acres of land; it was provided in that agreement that the Indians should receive certain benefits, and in addition thereto the sum of one million five hundred thousand (\$1,500,000) dollars, to be placed to their credit as a trust fund to draw five per cent interest. In the ratification of the said agreement Congress ratified the agreement in part only; the ceded land was opened to settlement, but that part of the agreement which provided for payment for the land so ceded was not ratified, upon the ground that the Indians had no title to the land, and that their right of occupancy existed only at the will of Congress or the Executive, and no payment was made for said ceded land and no adjustment of the claim of said Indians for said land was ever made until the said act approved under date of June 21, 1906, set forth in paragraph 1 hereof.

The said Indians finding themselves despoiled of their land and without compensation, contrary to the terms of the agreement of cession entered into pursuant to the Act of August 19, 1890 (26 Stats., 355), employed counsel to represent them in the prosecution of their claim for compensation for said land, and entered into a contract under the provisions of the Revised Statutes of the United States with Levi Maish of Pennsylvania and Hugh H. Gordon of Georgia to pay said Maish and Gordon fifteen per centum of the amount which might be recovered on said claim, contingent upon recovery. That contract was approved by the Commissioners of Indian affairs, July 17, 1894, and by the Secretary of the Interior, July 25, 1894, and bore date in May, 1894, running for ten years, so that it expired by limitation in May, 1904.

The Secretary of the Interior reduced the agreed compensation, as provided in said contract, to ten per centum of the amount recovered, contingent upon recovery, which rate of compensation was accepted by the contracting attorneys. After the expiration of that contract in May 1904, these Indians continued in their effort to secure payment for their said lands, and executed a further contract with E. C. MacDonald of Washington (State), signed the 5th and 12th day of

November, 1904, in which the said Indians agreed to pay to the said attorney ten per centum of any money or sums of money which may be collected for said Indians, and the efforts of counsel so employed, and their associates, resulted favorably under and by the terms of the act approved June 21, 1906, herein set forth, whereby the sum of one million five hundred thousand dollars was set aside to be held in the Treasury of the United States for the use and benefit of said Indians.

### III.

Petitioners herein, Marion Butler, in his own individual capacity, and Marion Butler and Josiah M. Vale, associated under the firm name of Butler & Vale, together with the attorneys named in said contracts and other attorneys with petitioners associated, rendered services continuously to the said Indians in the prosecution of their said claim from on or about March 5, 1901, down to and including the date of adjustment of the said claim under the act of Congress as in this petition set forth; and petitioners further state that, so far as they have knowledge of the attorneys who have rendered services to said Indians in the prosecution of said claim, petitioners in this suit represent said attorneys and all thereof who have rendered services to said Indians in the prosecution of their said claim by agreements defining the compensation of each and all the attorneys who have so represented said Indians, and they bring this action as well on behalf of other attorneys who have performed services as counsel on behalf of said Indians as on their own behalf.

### IV.

Petitioners further say that the services of attorneys rendered to said Indians in the prosecution of their said claim are of the reasonable value of two hundred and twenty-five thousand (\$225,000) dollars, or fifteen per centum of the amount secured for said Indians and set aside for their use under the terms of said act approved June 21st, 1906, and that there should be paid as compensation to the attorneys who have performed services as counsel on behalf of said Indians, as aforesaid, in the prosecution of the claim of said Indians the said sum of money, for which sum they bring this suit; and petitioners further state that they are the sole owners of said claim for compensation as herein set forth, that they have not transferred or assigned the same, or any part thereof, or any interest therein, except as herein set forth, and that petitioners are justly entitled to the amount herein claimed from the United States, the United States as trustee for the said Indians, and from the said Indians, after allowing all just credits.

Wherefore petitioners pray final judgment in the amount of two hundred and twenty-five thousand dollars.

BUTLER & VALE.  
MARION BUTLER.  
JOSIAH M. VALE.

## DISTRICT OF COLUMBIA, ss:

I, Josiah M. Vale, do state on oath that I am a member of the firm of Butler & Vale, which firm is composed of Marion Butler and myself, and that I have read the foregoing petition by me subscribed and known the contents thereof, and that the matters and things therein set forth are true as I verily believe.

J. M. VALE.

Subscribed and sworn to before me this 26th day of June, 1906.

S. A. TERRY,  
*Notary Public.*

In the Court of Claims, December Term, 1906.

No. 29526.

BUTLER & VALE  
vs.  
THE UNITED STATES et al.

Allowed and Filed October 31, 1907.

*Intervening Petition of Hugh H. Gordon.*

To the Honorable the Chief Justice and Judges of the Court of Claims:

Comes now Hugh H. Gordon, and by leave of the Court first obtained, files this, his intervening petition, and respectfully represents to the Honorable Court as follows:

1. That he is a citizen of the United States and a resident of the State of Florida.
2. That the petitioner, Hugh H. Gordon, in connection with Levi Maish, now deceased, accepted employment as counsel from the Colville Indians and other bands of Indians on the Colville Reservation to prosecute their claim for compensation from the United States for the value of 1,500,000 acres of land ceded to the United States by said Indians under an agreement of date May 9, 1891, which agreement, so far as it related to the payment of the sum of \$1,500,000, was not ratified and carried out by the Congress; that the employment of said Maish and Gordon by said Indians as aforesaid resulted in the entering into of a contract between said Maish and Gordon and the said Colville and other bands of Indians on said Colville Reservation for the prosecution of the claim of said Indians against the United States, at and for a fee or compensation of fifteen per centum of the amount which might be recovered on said claim, which contract bore date in May 1894, running for ten years, and was approved by the Commissioner of Indian Affairs on July 17, 1894, and by the Secretary of the Interior on July 25, 1894.
3. That the said Hugh H. Gordon, your petitioner, did, prior and

subsequent to the signing, sealing, and delivery of the contract between the said Colville and other bands of Indians on the Colville Reservation and the said Levi Maish and Hugh H. Gordon, which was approved by the Commissioner of Indian Affairs and the Secretary of the Interior as aforesaid, perform legitimate legal and professional services as attorney, for and in behalf of said Indians before Congress and the Departments, and elsewhere, diligently, faithfully and continuously, personally and by his authorized representatives, from the date of his said employment and under the terms of said contract, from the date thereof as above alleged until the date of the passage of the act of Congress referring the matter of compensation for services of attorneys to this Court for adjustment and determination, namely, June 21, 1906.

4. That the Act of Congress approved June 21, 1906 (Public No. 258) provides that judgment shall be rendered in the name of Butler & Vale (Marion Butler and Josiah M. Vale) for the amount of compensation which shall be paid to the attorneys who have performed services as counsel on behalf of the Indians in the prosecution of the claim of said Indians for payment for said land, and in determining the amount of compensation for such services the Court may consider all contracts or agreements heretofore entered into by said Indians with attorneys who have represented them in the prosecution of said claim, and also all services rendered by said attorneys for said Indians in the matter of said claim; that the payment or distribution of said judgment shall be in full compensation to all attorneys who have rendered services to said Indians in the matter of their said claim, the same to be apportioned among said attorneys by said Butler & Vale as agreed among themselves.

That the said Butler & Vale have filed a petition in this Court without having made any reference therein whatever to the name and claim of your petitioner, who performed services as attorney and incurred large expenses for said Indians in and about the prosecution of their said claim against the United States.

That the said Butler & Vale have set themselves up in advance of the action and judgment of the Court as the judges under the said Act of Congress as to what attorneys who have performed services for said Indians shall be recognized as having a right to participate in the proceeds of any judgment that may be rendered by this Court for distribution among all of the attorneys who are entitled to receive compensation under the provision of said Act, and in what manner they will distribute said compensation, and have assumed to control and distribute the compensation that may be due your petitioner under any judgment or decree that may be rendered by this Court without having made him a party to this suit, and without his consent or agreement.

5. That the claimants in this suit allege in their petition, which is in the nature of creditors' bill in equity, as follows:

"And petitioners further state that, so far as they have knowledge of the attorneys who have rendered services to the Indians in the prosecution of said claim, petitioners in this suit represent said attorneys and all thereof who have rendered advices to said Indians in

the prosecution of their said claim by agreements defining the compensation of each and all attorneys who have so represented said Indians, and they bring action as well on behalf of other attorneys who have performed services as counsel on behalf of said Indians as on their own behalf."

Your petitioner avers that in accordance with the above allegation of claimants' petition, and inasmuch as they are not authorized to represent him or his claim in any manner in this Court, or to distribute any part of the judgment that may be awarded by the Court for compensation to attorneys under the said Act of Congress to which he is personally entitled, that therefore he may be permitted to intervene as a claimant for the protection of his own interests and rights.

6. That the claimants have not consulted with your petitioner as to any arrangement or understanding, or made any arrangement or agreement with him as to what amount of compensation shall be allowed or distributed to him for his said services as attorney to said Indians under any judgment or decree of this Court, or in any manner whatever in regard to the distribution of the proceeds of any such judgment or decree.

7. That your petitioner believes and avers that it is to his interest to have his right and claim to attorneys' fees or compensation for such services specifically decreed or adjudged by the Court in his own name and behalf, inasmuch as Levi Maish and himself were only associated together in the contract in the prosecution of the claim, and were not partners in the case or for any purpose whatever.

8. That it is not the wish or intention of your petitioner to disclaim the right to compensation to such persons or attorneys as rendered services under sub-contracts with Maish and Gordon in the former's lifetime or under sub-contracts entered into by your petitioner subsequent to Maish's death, but it is the desire of your petitioner that such obligations shall be faithfully carried out according to the terms and letter thereof.

Wherefore, your petitioner prays for leave to file this, his intervening petition, and that in the determination and adjudication of the question of compensation to attorneys for services under the said Act of Congress, his rights and claims may be considered, and that he may be awarded and decreed or adjudged such compensation for his services, and have such relief granted him as to the Court may seem just and proper.

HUGH H. GORDON.

DISTRICT OF COLUMBIA, ss:

Hugh H. Gordon being duly sworn upon his oath, says that he is the petitioner in the foregoing petition; that he has read over and knows the contents of said petition and that the facts stated therein upon his personal knowledge are true, and those stated upon information and belief he believes to be true.

Sworn to and subscribed before me this 24th day of October, 1907.

[SEAL.]

A. M. PARKINS,  
*Notary Public.*

In the Court of Claims,

No. 29526.

BUTLER & VALE -

v.

THE UNITED STATES et al.

*Answer of Plaintiffs to the Intervening Petition of Hugh H. Gordon.*

To the Honorable the Chief Justice and Judges of the Court of Claims:

Come now the plaintiffs in the above entitled cause, and not admitting the right of said Hugh H. Gordon to intervene herein, or the power of this Court to receive and consider his said intervening petition, but protesting against said right, and denying the jurisdiction of the Court to receive and consider said petition, and in the manner and of the same tenor and effect as if a plea to the jurisdiction of the Court had been interposed against the same, and thus denying and protesting they make answer and say:

I.

They admit the first paragraph of said petition in intervention.

II.

Plaintiffs deny the matters contained in the second paragraph of the said petition in intervention as the same are therein alleged, and state the facts to be that, in May, 1894, the claimant Indians entered into a contract with Levi Maish, of Pennsylvania, and Hugh H. Gordon, of Georgia, who were styled in said contract "Maish & Gordon," to pay to them in consideration for the services to be rendered by said Maish & Gordon the sum of fifteen per centum of any money or sums of money which might be collected for said Indians under the provisions of said contract, agreeing to pay to the said Maish & Gordon as compensation the sum of fifteen per centum of any appropriation which might be made for the payment of said claim (Record, page 14); that said contract was approved by the Commissioner of Indian Affairs, July 17, 1894, and by the Secretary of the Interior, July 25, 1894, the compensation having been reduced by the Secretary of the Interior to ten per centum of the amount recovered, contingent upon recovery, which rate of compensation was accepted by the said Maish & Gordon on January 20, 1899, by "Levi Maish, for Maish & Gordon" (Record, page 17). Said contract expired by limitation in May, 1904.

III.

Plaintiffs deny the matters and things alleged in the third paragraph of the said petition in intervention as the same are therein

alleged: they deny that Hugh H. Gordon did, prior to and subsequent to the execution of said contract, set out in the second paragraph of the said intervening petition, perform legitimate, legal and professional services as attorney on behalf of said Indians, before Congress and the Departments and elsewhere, diligently, faithfully and continuously, but, on the contrary, plaintiffs allege the facts to be that the said intervenor rendered very meager services to the claimant Indians under said contract for which compensation can be rendered under the terms of the jurisdictional act herein; that said intervenor abandoned the services contracted to be rendered to said Indians and accepted service under the Government of the United States as an officer in the army, and thus subjected himself to the inhibition of the laws of the United States in pressing the said claim, under section 5498, Revised Statutes. Plaintiffs further deny that intervenor rendered any personal services to the claimant Indians after the date of his discharge from the army of the United States, and specifically deny that he rendered any such services after the expiration of the said Maish & Gordon contract in 1894.

#### IV.

Plaintiffs deny the matters and things alleged in the fourth paragraph of intervenor's petition in the manner and form alleged, and state the facts to be that plaintiffs filed their petition herein, without redundancy, as the jurisdictional act required the facts to be stated; and they deny that in filing said petition they have transcended the powers and duties conferred upon them by Congress, but, on the contrary, they aver that said petition strictly conforms to the terms of the jurisdictional act herein, and that they have assumed no power inconsistent with the duties cast upon them by Congress under the terms of the jurisdictional act; and plaintiffs further aver that the sole issue in said jurisdictional act is the amount of compensation which shall be paid to all the attorneys who have performed services to the claimant Indians; that the measure or value of the services performed by any particular attorney is not in issue in this cause, and they deny that it is within the power or authority of intervenor to raise any new issue in this cause, such as is attempted to be raised as an issue herein by the petition in intervention, namely, the value of services to any one particular attorney, or the value of the particular service rendered by the intervenor, if any services were by him rendered to said Indians.

#### V.

Plaintiffs deny the matters and things set out in the fifth paragraph of the said petition in intervention in the manner and form as alleged, and deny that plaintiffs are unauthorized to represent him, the said petitioner, in said action, if in fact he performed any services to the claimant Indians as their attorney in the matter of their said claim, but, on the contrary, plaintiffs allege that the jurisdictional act specifically confers upon plaintiffs the right, and casts upon them the duty, of representing all attorneys, including the said intervening petitioner, if he rendered any services to the claimant Indians as

their attorney in the prosecution of their said claim, as well and in like manner as all other attorneys who have rendered services to the said Indians in the matter of their said claim; and plaintiffs state that intervenor is one of the attorneys who have agreements among themselves.

## VI.

Plaintiffs deny the sixth allegation in the petition in intervention, and state the facts to be that a specific agreement exists between plaintiffs and said intervening petitioner respecting the amount of compensation which shall be paid to him; that he entered into a contract with the plaintiffs and other counsel wherein he specifically acted for himself and his associates respecting the submission of the question of attorneys' fees to the Conference Committee of the Senate and House of Representatives (Record, page 165); that he, the said Gordon, subsequently entered into another specific agreement with plaintiffs and other attorneys for claimant Indians, whereby a sum of money was apportioned to the said Gordon and to other attorneys, as was contemplated by the terms of the jurisdictional act approved June 21, 1906, which act provides that the money arising from the judgment rendered by this Court shall be apportioned among the attorneys who have rendered services to the claimant Indians by Butler & Vale, as agreed among themselves; that at the time of the said last specific agreement, to which the intervening petitioner was a party, he held out to plaintiffs that he was continuing to act for himself and his associates; he so held out to plaintiffs in many interviews and in the extended negotiations had between the said Gordon and plaintiffs respecting the amount of the compensation to be so apportioned, and during such negotiations he was particularly anxious in dealing with plaintiffs to magnify the extent of his liability to compensate associates from the fund so apportioned to him so that the same might be swollen to the largest possible limit, and such was his attitude up to the time of the filing of the petition herein, and, so far as plaintiffs are aware, up to the time plaintiffs refused to increase his compensation, as hereinafter set forth, and that such compensation was fixed and determined by agreement with said Gordon wholly upon the theory that the said Gordon was acting for himself and his associates, and was not acting for himself alone; and it was particularly understood during said negotiations that the said sum agreed to be paid to the said Gordon embraced whatever amount had been rendered by his copartner, Levi Maish, in rendering services to said Indians; and plaintiffs further say that said Gordon well knew, when he filed his intervening petition herein, to which this answer is now made, that a specific agreement in writing was, at that time, subsisting between him, the said Gordon, and plaintiffs for the proportionate share of himself and associates of the fee or compensation earned by attorneys who have rendered services to said Indians in the prosecution of their claim, and petitioners further say that after the said Gordon entered into said last named specific arrangement and since the filing of the petition herein, he, the said Gordon, admitted over his own signature the existence of such an agreement, and endeavored through correspondence with plaintiffs to modify the

said agreement so as to entitle him to additional compensation, which was by plaintiffs denied, and plaintiffs refer to the letter of said Gordon to plaintiffs, dated at Reynolds, Ga., on the 13th day of July, 1906, a copy of which is hereto attached and marked Exhibit "A," and the "Little Memorandum" which he enclosed to plaintiffs along with the said letter, a copy of which is hereto attached and marked Exhibit "B," and also the reply of plaintiffs to the letter, dated at Washington, D. C., on the 16th day of July, 1906, a copy of which is hereto attached and marked Exhibit "C;" and plaintiffs state that the petition in this cause was filed in this Court on the 23th day of June, 1906, that on the 27th day of June, 1906, plaintiffs wrote said Gordon at Biscayne, Fla., which was believed to be his place of residence, stating that the petition had been filed and requesting, for the office use of plaintiffs only, a full statement of the services he, said Gordon, had rendered or caused to be rendered, and that Levi Maish or Maish & Gordon had rendered to the said Colville Indians to establish their claim, a copy of which letter is hereto attached and marked Exhibit "D;" that not hearing from said Gordon in reply to plaintiffs' said letter of June 27, 1906, plaintiffs again wrote to said Gordon under date of July 5, 1906, enclosing to him a printed copy of the petition herein filed, and again requested a statement of services rendered said Indians, cautioning said Gordon that what plaintiffs meant was a specific statement of services rendered on behalf of the Indians as opposed to services rendered to Maish & Gordon in procuring their contract, and again asking what Maish did so far as he, said Gordon, had knowledge, before said Maish's death, and calling attention to the letter of plaintiffs of June 27, 1906, a copy of which letter of July 5, 1906, is hereto attached and marked Exhibit "E;" that on the 11th day of July, 1906, plaintiffs received a letter from said Gordon dated on the 10th day of July, 1906, at Reynolds, Ga., in which said Gordon stated that he was then on the "sick-list," and as soon as he became well enough he would prepare and forward to plaintiffs "a statement in regard to the services rendered by Maish & Gordon to the Colville Indians," thus, as theretofore, continuing to hold himself out to plaintiffs as acting for Maish & Gordon, a copy of which letter is hereto attached and marked Exhibit "F;" and plaintiffs charge and aver that said Gordon's attitude in holding himself out to plaintiffs as the survivor of Maish & Gordon did not change until after the refusal of plaintiffs to increase the compensation payable to said Gordon under the existing agreement; that soon after such refusal on the part of plaintiffs, but before the letter of plaintiffs containing said refusal had time by the due course of mail to reach said Gordon, to-wit, on the 21st day of July, 1906, plaintiffs received from said Gordon a postal card dated March 18, 1906, which postal card was, as plaintiffs believe, in fact written on July 18th, but was inadvertently dated in March, in which postal card the said Gordon requested plaintiffs to send to him interrogatories with a view to drawing out the statement of services plaintiffs desired, and requested the agreement to be sent him "about proportionate increase of fees in case fifteen per centum is allowed," a copy of which said postal card is hereto attached and marked Exhibit "G," and it is

prayed that the said Exhibits A, B, C, D, E, F, and G may be read and considered as a part hereof; that after the refusal of plaintiffs to make any change in the existing agreements for free distribution, said Gordon changed his attitude respecting the statement of services and neglected and refused to forward said statement, but plaintiffs were not aware that he had changed the attitude held out to plaintiffs from the beginning that he was the survivor of Maish & Gordon and was acting as such survivor in his negotiations and agreement with plaintiffs, until the said Gordon appeared upon the witness stand at Miami, Fla., on December 13, 1903 (Record, page 187), and there volunteered testimony over the objection of plaintiffs that he and Maish were not copartners, and that such voluntary testimony is in the following language: "In this connection, I wish to state that Maish and myself, though associated in this case, were never partners in this or any other case" (Record, page 188); and plaintiffs state that the said voluntary testimony was the first intimation of a change of attitude on the part of said Gordon respecting his authority and liability as the survivor of Maish & Gordon; and plaintiffs further aver that the money finally contracted to be paid to said Gordon by plaintiffs, will, under the law, as plaintiffs are advised, be so payable, as plaintiffs have always understood, subject to the rights of his copartner, Levi Maish; but plaintiffs, further protesting, answer and say that the distribution of any fund which may arise under the judgment of this Court is not now in issue in this cause, and that such distribution is not within the jurisdiction of this Court, and that no such issue is raised by the petition herein, and that the intervening petitioner has no power to raise such issue in this cause, even if this Court could take jurisdiction thereof, for that the same is a new issue and can not be raised by a petition in intervention.

## VII.

Plaintiffs deny the matters and things contained in the seventh paragraph of intervenor's petition, and specifically deny that Levi Maish and Hugh H. Gordon were not co-partners in any fund which may become payable to them or either of them under the terms of their expired contract with claimant Indians, but, on the contrary, plaintiffs allege the fact to be that upon the face of said contract, set forth at large in the record herein, at pages 13 to 15 and the acceptance of said contract as the same was approved, as set forth in the record at page 17, that said Maish & Gordon were such copartners, and have so held themselves out to the contracting Indians and to the Interior Department; and plaintiffs are informed and believe, and upon such information and belief they say, that Hugh H. Gordon not only so held himself out to plaintiffs as the surviving partner of Maish & Gordon, but he, also, so held himself out to Daniel B. Henderson and Heber J. May, and as such surviving partner the said Gordon executed a contract wherein said Heber J. May and Daniel B. Henderson contracted with said "Hugh H. Gordon, of Atlanta, Ga., for himself and as surviving partner of the firm of Maish & Gordon," that said contract was made in January, 1901, as will more fully appear from a copy of said contract hereto attached and made

a part hereof and marked Exhibit "H," and plaintiffs aver that said intervening petitioner, Hugh N. Gordon, acted within the full scope of his legal authority in winding up the affairs of the copartnership of said Maish & Gordon, in dealing with plaintiffs as for himself and his associates, as hereinbefore in this answer set forth, and plaintiffs further in answer to the seventh paragraph of said intervening petition, protesting as they have in this petition heretofore protested, say that the issue of the copartnership between said Maish & Gordon, the liabilities of said Maish & Gordon, or their respective rights in the division of any fund accruing to them or either of them by reason of any judgment of this Court under the jurisdictional act herein, cannot be tried in this cause; that such issue or issues are not raised by the pleadings, and that the said petitioner in intervention cannot, under the authority of the law, raise such issue or issues in this cause, and plaintiffs further say that the amount of compensation payable to said Gordon is an issue of fact between said Gordon and said plaintiffs, wherein the amount in controversy exceeds the sum of twenty dollars, and plaintiffs are entitled to a trial by jury to determine said issue.

### VIII.

Plaintiffs further answering say that while the petitioner in intervention in the eighth paragraph of his said petition disclaims any intent to impair the rights of any person who rendered services under "sub-contracts with Maish & Gordon," and while the meaning of such disclaimer is obscure to plaintiffs and not fully understood, they allege the fact to be that petitioner in intervention is not a resident of the District of Columbia, wherein any judgment by this Court in this cause would be paid, that he has no property in the District of Columbia, as plaintiffs are informed and believe, and upon such information and belief so aver, and that if his prayer for a separate judgment be granted by this Court, plaintiffs will be rendered incapable of carrying out the terms of the jurisdictional act in the apportionment of the fund according to the existing agreements among attorneys who have rendered services to said Indians, and the duty cast upon the Secretary of the Interior will be rendered very difficult, if not impossible of execution, to take receipts for moneys paid out to attorneys who have rendered services to said Indians by plaintiffs (Butler & Vale) and who have agreements among themselves, in full discharge of all claims and demands for services rendered said Indians in the matter of their said claim, as is provided by the terms of the jurisdictional act.

Wherefore, plaintiffs pray that the petition of the said intervenor Gordon be dismissed.

BUTLER & VALE,  
By J. M. VALE,  
*Attorney of Record.*

DISTRICT OF COLUMBIA, ss:

I, J. M. Vale, being duly sworn, do state on oath that I know the contents of the foregoing answer by me subscribed; that the matters

therein stated, of my own knowledge are true, and the matters stated on information and belief I believe to be true.

J. M. VALE.

Subscribed and sworn to before me, a Notary Public in and for the District of Columbia, this 11th day of December, 1907.

[NOTARIAL SEAL.]

MARTHA M. BECK.

*Notary Public.*

(Copy.)

EXHIBIT "A."

REYNOLDS, GA., July 13, 1906.

Messrs. Butler & Vale, Washington, D. C.

DEAR SIRS: As I wrote you a few days since, I have been quite unwell recently; but am now able in some measure to attend to business.

In thinking over your request that I forward to you a statement as to services in Colville matter by Maish & Gordon and by me individually, I think it will be better for you to send me an advance copy of questions which you propose to incorporate in the interrogatories. This will enable me to be better guided as to form, etc.

In meantime I enclose a little memorandum of agreement providing that my fee is to be increased in proportion in case the Court of Claims allows the attorneys more than ten per centum. I know, of course, that this is understood; but in order to avoid any misunderstanding or possible misconstruction, I would like to have this little memorandum signed. As you are aware, I feel very sure over the proportion of fee coming to me, and I trust there will be no occasion for further friction. Trusting there will be an early adjustment of the matter in the Court of Claims, I am,

Very truly, etc.,

(Signed)

HUGH H. GORDON.

In case you wish a copy of the enclosed memorandum, have it typewritten in duplicate and sign both and I will sign and return one copy to you.

[This letter enclosed in envelope, addressed to: Butler & Vale, Attorneys at Law, Bond Building, Washington, D. C.

From Hugh H. Gordon, Attorney and Counsellor at Law, Reynolds, Ga.

Postmark: Received, Washington, D. C., July 16, 1906, 2-A. M.]

(Copy.)

## EXHIBIT "B."

*Memorandum of Agreement.*

In the matter of the claim of the Colville Indians for \$1,500,000.00, due them for lands ceded to U. S. Government in 1891, it is hereby agreed between Hugh H. Gordon, of Georgia, and Butler & Vale, of Washington, D. C., that in case the Court of Claims allows the attorneys in said case a fee greater than ten per centum of said \$1,500,000.00, the amounts heretofore agreed upon as the fee to be paid to each attorney in said case, shall be increased in like proportion.

In witness whereof, we have hereunto affixed our hands and seals this, the — day of July, 1906.

(Signed)

HUGH H. GORDON. [SEAL.]

(Copy.)

## EXHIBIT "C."

JULY 16, 1906.

Maj. Hugh H. Gordon, Reynolds, Ga.

DEAR SIR: We have your esteemed favor of the 13th inst. and note contents thereof.

We regret to state that our obligations will not permit of any increase in the amount to be paid to Maish and Gordon, or yourself, as their survivor. We, therefore, must decline to sign the contract which you enclosed.

The question we desire to propound will be substantially this: State what services have been rendered to the Colville Indians by Levi Maish or yourself in the matter of securing payment to said Indians for the north-half of their reservation? State specifically.

It is important not to embrace in your answer services whereby the opinions of individual members of Congress were attempted to be favorably inclined to the claim, nor services in procuring the Maish-Gordon or any other contract. These would not be regarded of value by the Court. We want to show services before the Department and before committees of Congress in explaining and establishing the claim.

We desire to take your deposition promptly, if you have rendered services of the character indicated, so please kindly forward your statement at the earliest possible date.

We wish to accentuate the fact that we never understood that there would be any increase in payment to you for yourself or Maish and Gordon, under any circumstances, over what has already been specifically contracted to be paid.

Yours very truly,  
(Signed)

BUTLER & VALE,  
By J. M. VALE.

(Copy.)

## EXHIBIT "D."

JUNE 27, 1906.

Hugh H. Gordon, Esq., Biscayne, Fla.

DEAR SIR: We have filed the petition on the Court of Claims in the Colville case. A copy thereof will be sent to you as soon as same is printed.

Please write us, for our office use only, a full statement of what you yourself have done, or caused to have been done, what Levi Maish has done, or Maish and Gordon, in rendering services to the Indians to establish their claim.

We can not show, and therefore do not care to know, what was done in procuring contract.

In stating services please state date, and before whom and by whom appearance was had.

Very truly yours,

BUTLER & VALE,  
By J. M. VALE.

(Copy.)

## EXHIBIT "E."

JULY 5, 1906.

Mr. Hugh H. Gordon, Biscayne, Fla.

DEAR MR. GORDON: We enclose you herewith a printed copy of the petition in the Colville case.

We are waiting for your statement upon which to predicate interrogatories for your deposition showing services.

What we specifically want to know is what did you do on behalf of the Indians? We do not mean with reference to procuring a contract or anything in connection with the contract; that is no service rendered to the Indians but to yourself. What did Maish, do, so far as you know, in furthering the claim before his death? Please be specific in your statement, and retain copy so that your statement to us and in your deposition will exactly conform.

Who rendered services, and what was done after the contract was procured, before Judge May commenced work?

Please answer this letter promptly so that we may have your deposition at the earliest possible date.

Very truly yours,

BUTLER & VALE,  
By J. M. VALE.

P. S.—We call attention to our letter of the 27th ulto. Enc.

(Copy.)

## EXHIBIT "F."

REYNOLDS, GA., July 10, 1906.

Butler &amp; Vale, Washington, D. C.

DEAR SIRS: I left Biscayne, Fla., several weeks ago to attend wedding of my son at Athens, Ga. Since then have been in Covington

and Atlanta and finally came here to my plantation and peach orchard. Your letters have been following me around from point to point and have finally reached me here.

At present I am on the sick list; but as soon as I am well enough, I will prepare and forward to you a statement in regard to the services rendered by Maish & Gordon to the Colville Indians.

Very truly, etc.,  
(Signed)

HUGH H. GORDON.

[This letter enclosed in envelope, addressed to, Butler & Vale, Attorneys at Law, Bond Building, Washington, D. C.

From Hugh H. Gordon, Attorney and Counsellor at Law, Reynolds, Ga.

Postmark: Received, Washington, D. C., July 11, 1906, 11-P. M.]

(Copy.)

#### EXHIBIT "G."

REYNOLDS, GA., March 18, 1906.

DEAR SIRS: I write this hurried card to say that I think, upon reflection, that you had best hurry forward such interrogatories as you propose sending me. I am going north in about ten days, so please forward by first mail.

Send also the agreement about proportionate increase of fees in case 15% is allowed.

Yours hastily,  
(Signed)

HUGH H. GORDON.

[Card addressed to, Messrs. Butler & Vale, Attorneys at Law, Bond Building, Washington, D. C.

Postmark: Received, Washington, D. C., July 21, 1906, 10-A. M.]

(Copy.)

#### EXHIBIT "H."

This Agreement made and entered into by and between Hugh H. Gordon, of Atlanta, Georgia, for himself, and as surviving partner of the firm of Maish & Gordon, Party of the First Part, and Heber J. May and Daniel B. Henderson, Parties of the Second Part,

Witnesseth: That whereas Levi Maish and said Hugh H. Gordon did enter into a contract, approved by the Secretary of the Interior July 25, 1894, with the Columbia Indians, or Moses Band, the Nes Perces Indians, or Joseph's Band, the Okanagan Indians, the Colville Indians and the Lake Indians, whereby said Maish & Gordon were employed as attorneys by said Indians to collect from the United States \$1,200,000 due them under a contract of May 9, 1891, and

Whereas, the Party of the First Part has employed, and by these presents does employ, the said Parties of the Second Part as attorneys at law to prosecute said claim of said Indians against the United States,

Now, Therefore, it is mutually agreed that said Parties of the Second Part shall be and become associate attorneys of record for said Indians in the prosecution of said claim, and they are hereby expressly authorized and fully empowered, as such associate counsel and attorneys, to represent the interests of said Indians in said claims, and to secure the payment of the amount due from the United States; they, the said Parties of the Second Part, hereby agreeing that they will faithfully and diligently represent and urge the claims of the said Indians before the Courts, the Departments of the Government, the Congress of the United States, or before any other tribunal which may take cognizance of said claims, and will pay all expenses that may be incurred by them in the prosecution of said claims.

In consideration of the foregoing covenants and of the services to be rendered by said Parties of the Second Part, the said Party of the First Part assigns unto said Parties of the Second Part one-fourth ( $\frac{1}{4}$ ) of the fee that may become due and payable unto him under said contract, and agrees that twenty-five (25%) per cent thereof, together with the additional sum of Ten Thousand (\$10,000) Dollars shall be paid to them as compensation of their services as such attorneys, the remainder, or seventy-five (75%) per cent, less the \$10,000.00 aforesaid, to be retained by the said Party of the First Part.

And the said Party of the First Part hereby declares that he has executed concurrently herewith, and has delivered unto the said Parties of the Second Part, for record in the office of Indian Affairs, assignment of twenty-five (25%) per cent of said fee, which is to be promptly paid to them out of said fee, when received by said Party of the First Part out of any appropriation which may be made for the payment of said claim to said Indians.

Reference is expressly hereby made, for a more complete interpretation of this agreement, to the aforesaid contract between the said Indians and Maish & Gordon.

Witness our hands and seals, this — day of January, 1901.

(Signed)	HUGH H. GORDON.	[SEAL.]
(Signed)	DANIEL B. HENDERSON.	[SEAL.]
(Signed)	HEBER J. MAY.	[SEAL.]

Witnesses: To signature of Hugh H. Gordon:

C. S. MESHIER.  
A. B. WEIL.

Witnesses: To signatures of Heber J. May and D. B. Henderson:

R. H. MAY.

In the Supreme Court of the United States, October Term, 1911.

No. 283.

FREDERICK C. ROBERTSON, Appellant,  
vs.

HUGH H. GORDON, MARION BUTLER, and JOSIAH M. VALE, Individually and as Partners under the Firm Name and Style of Butler and Vale, Appellees.

*Stipulation.*

Pursuant to stipulation in trial court, (Record 101) on appeal, (Record 188-189) and, for the convenience of the Supreme Court of the United States in considering certain parts of the record in the case of Butler and Vale vs. United States, Trustee, Court of Claims No. 29,526, it is hereby stipulated and agreed between counsel for the respective parties to this cause, that the foregoing copies of parts of the record of said Court of Claims be incorporated in the record in this cause and printed for the use of the Court the same as if formally introduced and certified as a part of the record by the Court of Appeals of the District of Columbia, said copies of parts of the Court of Claims' record being: (1) the petition of Butler and Vale, (2) the intervening petition of appellee, Hugh H. Gordon, (3) the answer of Butler and Vale thereto, with exhibits, and (4) the findings of fact, conclusions of law and opinion of Court of Claims, which said last mentioned document is also a copy of Exhibit A., to answer of appellee Gordon in this cause.

GEO. H. PATRICK,

*Counsel for Appellant.*

JAMES B. ARCHER,

*Counsel for Appellee Gordon.*

[Endorsed:] File No. 22,169. Supreme Court U. S. October Term, 1912. Term No. 56. Frederick C. Robertson, Appellant, vs. Hugh H. Gordon et al. Stipulation and addition to record. Filed August 30, 1912.

Endorsed on cover: File No. 22,169. District of Columbia Court of Appeals. Term No. 56. Frederick C. Robertson, appellant, vs. Hugh H. Gordon, Marion Butler, and Josiah M. Vale, individually and as partners under the firm name and style of Butler & Vale. Filed May 13th, 1910. File No. 22,169.

United States Court, U. S.  
CLERK.

OCT 29 1912

JAMES H. MCKENNEY,  
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

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No. 56

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FREDERICK C. ROBERTSON, APPELLANT,

vs.

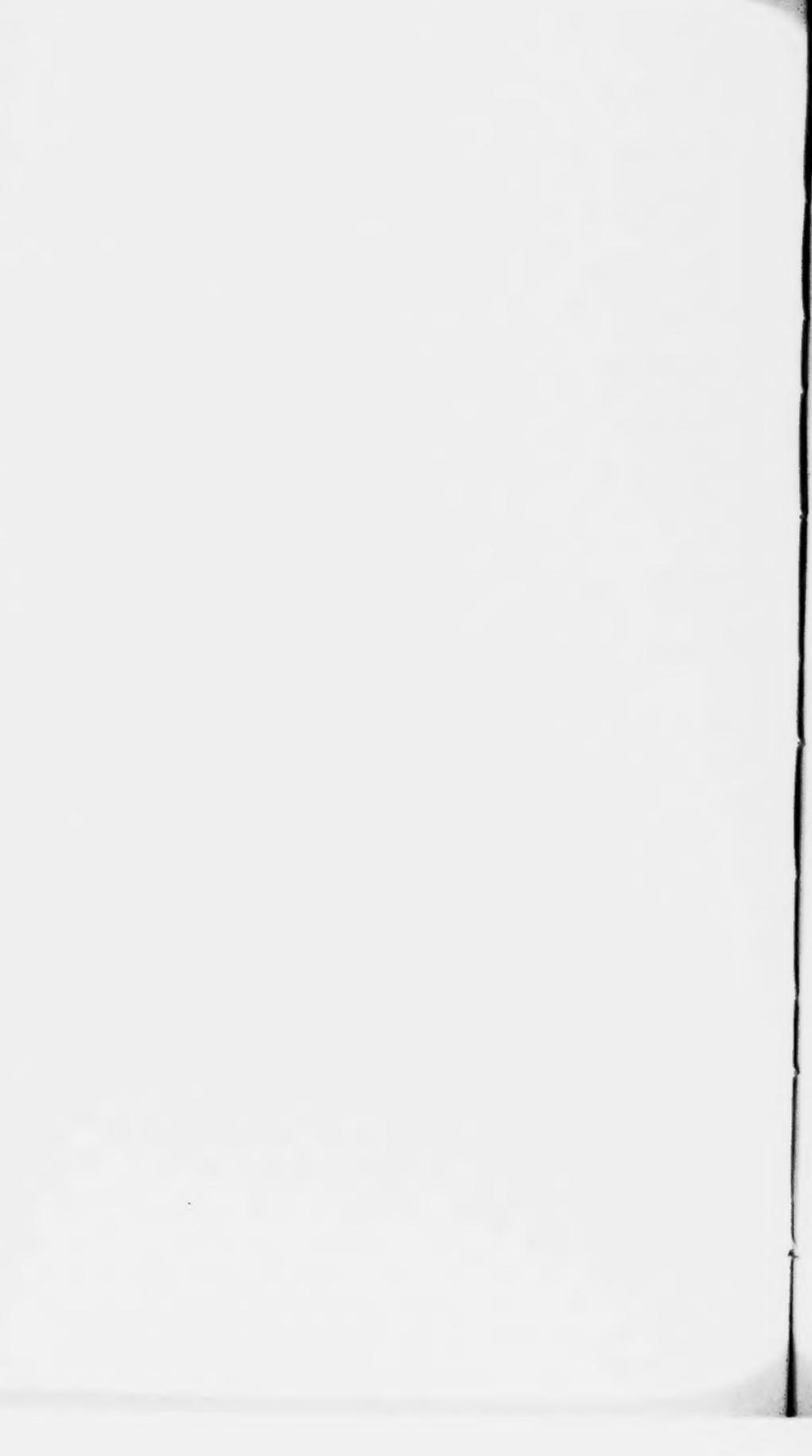
HUGH H. GORDON, MARION BUTLER, AND JOSIAH  
M. VALE, INDIVIDUALLY AND AS PARTNERS TRADING  
UNDER THE FIRM NAME AND STYLE OF BUTLER & VALE,  
APPELLEES.

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BRIEF FOR APPELLANT.

---

GEORGE H. PATRICK,  
GEORGE H. LAMAR,  
*Counsel for Appellant.*



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IN THE  
SUPREME COURT OF THE UNITED STATES.  
OCTOBER TERM, 1912.

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No. 56.

---

FREDERICK C. ROBERTSON, APPELLANT,

v.s.

HUGH H. GORDON, MARION BUTLER, AND JOSIAH M. VALE, INDIVIDUALLY AND AS PARTNERS TRADING UNDER THE FIRM NAME AND STYLE OF BUTLER & VALE, APPELLEES.

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BRIEF FOR APPELLANT.

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**Statement.**

This cause was begun by bill in equity by appellant and is presented upon appeal from the action of the Court of Appeals of the District of Columbia by which, for reasons stated in the opinion (R., 191-196; 34 D. C. Appeals, 539-548), and *differing from those stated in the opinion of the court below* (R., 184, 187), the decree of the Supreme Court of the District of Columbia (R., 187-8), adverse to appellant, was affirmed (R., 196).

The appellees other than Hugh H. Gordon are mere nominal parties, their claim of interest having been dis-

posed of adversely by decree (R., 51) of the lower court and affirmed on appeal by the Court of Appeals, whose opinion is reported in 34 Appeals D. C., 284-293. Therefore the principal appellee, Hugh H. Gordon, for convenience will be referred to in this brief as appellee.

The controversy involves the proper distribution between the appellant and the appellee of a fund of \$16,000, which constitutes a part of the sum of \$60,000 adjudged by the Court of Claims against the funds of the Colville Indians for the payment of counsel fees (R., 202-222), under authority of Congress contained in an item in the Indian Appropriation Act, approved June 21, 1906 (34 Stats., 325), and upon proceedings instituted, within the period of limitations, in the form of a petition by Butler and Vale, as plaintiffs, against the United States and the Colville Indians, as defendants.

As the fund involved was duly paid over by the proper officers of the Government into the hands of the receivers and, under decree (R., 20-21) of the trial court, the bill stands dismissed as to such officers and there is no question in the case involving the jurisdiction of the court over the fund, it is deemed unnecessary to recite the parts of the bill not pertinent to the controversy as presented.

The claim of the Indians was based upon the value of the north half of the Colville Reservation, for which the executive branch of the Government had promised in an agreement of May 9, 1891, negotiated under authority of the act of Congress of August 19, 1890 (26 Stats., 355), the sum of \$1,500,000.00; but, by the act of Congress of July 1, 1892, Congress restored the land to the public domain without ratifying the agreement or providing the consideration.

### Pleadings.

The bill sets up the fact of the execution of a contract by the Indians in favor of one Levi Maish and appellee for the prosecution of this claim within a period of ten years from date of approval, *the attorneys agreeing to bear their own expenses*; that after cutting down the amount of compensation, the Secretary of the Interior approved the contract on July 25, 1894; that the same was accepted by Maish, for himself and appellant, on January 20, 1899; that Maish subsequently died (February 26, 1899, R., 207); that this Indian contract "was impliedly continued in force" and remained in full force and effect "by virtue of the continued services thereunder, recognized, acquiesced in and confirmed by the United States of America, trustee for the said Colville Indians," "by the said Colville Indians, and by the Congress" and accepted by the said Maish and said Gordon, and by those claiming by, through and under them, or rendering service to the said Colville Indians which resulted in the prosecution and collection of said claim, including the plaintiff (appellant) and the said defendants Gordon, Butler, and Vale, to the extent that the said contract was held and considered an element in determining the amount of compensation for such services."

By the fifth paragraph of the bill (R., 3-4) it was averred that appellee entered into certain arrangements and agreements with appellant in the premises, admitting appellant to an equal copartnership or share with appellee, and which were afterwards adjudged, settled and reduced to writing between them.

This written agreement is then set out in full in the bill, reading as follows:

"MARCH 28, 1906.

"This agreement made between F. C. Robertson and Hugh H. Gordon, witnesseth, that they shall share equally in all monies appropriated by Con-

gress, or allowed by the Interior Department, which may accrue to said Gordon or said Robertson as attorney's fees, growing out of the rendition of services to the Colville Tribe of Indians, whether allowed under the Maish-Gordon contract with said tribe, or on any other theory whatsoever, which said interest is to enure to either party, no matter in whose name such allowance is made. Both parties hereto to mutually labor to secure such allowance. Out of said Robertson's share he agrees to compensate R. D. Gwydir by a reasonable compensation. The fees to be divided between said Robertson and said Gordon as herein provided shall be the net sum accruing to said Gordon, after settling with other attorneys under contract heretofore made by said Gordon.

"F. C. ROBERTSON,  
"HUGH H. GORDON."

(Italics supplied.)

In the same paragraph of the bill the appellant sets up, as an equitable assignment of a part of the share of appellee, the following instrument in writing, to wit:

"\$150.00.

"BISCAYNE, FLORIDA, *Mch. 21st, 1906.*

"Received of F. C. Robertson, of Spokane, Washington, one hundred and fifty dollars, with which to pay expenses of trip to Washington, D. C., to look after the interests of Gordon, Gwydir, and Robertson in the matter of the claims of the Indians of the Colville Reservation against the U. S. Government. In case we succeed in collecting said claim, I agree that out of my share of the profits, I will repay to said Robertson the said one hundred and fifty dollars (\$150.00).

"HUGH H. GORDON."

The bill then averred that the prosecution resulted in the recognition by Congress of the claims of the Indians and set out the statute by which the appropriation was made and the right of counsel to compensation was recognized,

and jurisdiction was conferred on the Court of Claims to fix the amount thereof in proceedings to be brought by Butler and Vale within thirty days from the passage of the act; the institution of such proceedings by Butler and Vale against the United States and said Indians; the rendition of final judgment by the Court of Claims, awarding \$60,000 for the compensation of counsel; that, in making the award, the Court of Claims had allowed \$16,000 to the appellant and appellee, \$14,000 of which "*in the name*" of *appellee* and \$2,000 of which "*in the name of*" *appellant*; that the

"Court of Claims made no judgment, decree or division between the parties in respect of any agreements or contracts among themselves, as and for compensation for services or expenses rendered by one of said attorneys for, or jointly with another, and such matter of agreement, contract or division was not submitted to and was not before the said court, but was expressly disclaimed by the said court in its said decision."

And the appellant further avers "that he is entitled to share equally in the gross sum of sixteen thousand dollars" and to have repaid to him, out of appellee's individual one-half share thereof, the further sum of \$150 under the aforesaid equitable assignment; and appellant offers to and submits the award standing in his own name to the order, process and judgment of the court.

The bill prayed for process, for injunction, for the appointment of receivers and for the distribution of the fund of \$16,000—

"As to equity and good conscience may seem fit and this court may order and direct \* \* \* for such other and further relief as shall be meet and agreeable to equity, and for the costs of the suit."

Exceptions to the original answer having been sustained in part (R., 38), the appellee by his amended answer (R.,

38-42) admits the execution of the contract of March 28, 1906, and of the equitable assignment for \$150.00, dated March 21, 1906, the fact that the award of the Court of Claims for services of appellant and appellee was \$16,000, \$14,000 of which in the name of appellee and \$2,000 in the name of appellant.

To these admitted averments of the bill the appellee in his said amended answer sets up the three following affirmative defenses, to wit:

First. That the contract of March 28, 1906, was predicated wholly upon the condition that the appellant should secure a *new contract from the Indians*.

Second. That the equitable assignment for \$150.00 was predicated upon the advance to him by appellant—

"To prevent the approval of the contract obtained by other parties, which if approved would have prevented said Robertson from obtaining said new contract, the procurement of which was a consideration for said agreement of March 28, 1906, which consideration wholly failed by the failure of said complainant to obtain said new contract"; and,

"Third. That the complainant (appellant), in the said Court of Claims, appeared and submitted his claim to one-half of the compensation to be awarded to this defendant \* \* \* that he submitted to, and the said court had jurisdiction to hear and determine his rights."

and that therefore the subject-matter of the controversy is *res adjudicata* between the parties and the appellant is estopped to assert his claim.

Exhibit A to the original answer (R., 202-222) is referred to (R., 39) as an exhibit to the amended answer of appellee, and consists of the findings of fact, conclusions of

law and opinion of the Court of Claims in said case of Butler and Vale against the United States and the Indians. These findings include the following: (1) Reference to the jurisdictional statute, (2) the history of the Indian claim, (3) recitation in full the Maish-Gordon contract, indicating acceptance by Maish and Gordon on January 20, 1899, (4) the oral employment by Maish and Gordon of Heber J. May as attorney and the death of Mr. Maish in February, 1899.

The services of appellee *to the Indians* are set forth in the next finding, as follows:

"V. Hugh H. Gordon. In the years 1895, 1896, after approval of the Maish-Gordon contract, said Gordon conferred with leading members of Congress and furnished them with facts and decisions of the court in relation to the matter, verbally employed Heber J. May, Esq., of Washington, D. C., and together with him and the said Maish prepared the first brief in the case. When the war with Spain was declared said Hugh H. Gordon was commissioned major and engineer officer and served as such in the United States and Cuba until after the close of hostilities, when he was discharged at his own request. In 1899 he made a contract with Heber J. May and Daniel B. Henderson, who subsequently brought in Marion Butler in the case. Afterwards said Gordon made an additional contract with said Butler. It appears that he had his father, the late ex-Senator Gordon, go to Washington (in 1902 or 1903, Finding VII, R., 208) and make an appeal in behalf of said Indians by interviewing a number of Senators and Representatives. Said Hugh H. Gordon *again went to Washington just before the close of the session in which the appropriation was made and did effective service in securing that appropriation.*" (Italics supplied.)

The seventh finding sets forth the services of Mr. Henderson, including that of making the request, resulting in the visit to Washington of Gen. J. B. Gordon, father of appellee,

in 1902 or 1903, and the next finding relates to appellant's connection with the matter, which reads as follows:

"VIII. Frederick C. Robertson, an attorney at law of Spokane, Wash., *became interested in the matter of the claim of said Indians through the solicitation of Hugh H. Gordon under the Maish-Gordon contract in the latter part of 1903 or 1904*, and when in the latter part of 1904 the Indians made a contract with E. C. McDonald he communicated said fact to said Gordon. In the early part of March, 1906, he went to Washington, D. C. He paid the expense of having Mr. Hugh Gordon come to Washington, and then for the first time met Vale and Butler and discussed the case with them, and with them undertook to map out such line of action as would conduce to establishing the rights of the Indians. He prepared a brief on the subject and saw the members of the Conference Committee and laid before them his views on the rights of said Indians. That he supplied Marion Butler from time to time with facts upon the matter.

*"It does not appear that said Robertson entered into any contract with any one as to compensation for his services.*

"It appears that besides the services rendered in the month of March, 1906, in Washington, D. C., as aforesaid, said Robertson worked on the matter a year or more at Spokane." (Italics supplied.)

The services of McDonald, Merrit J. Gordon, Robert W. Nuzum, and A. M. Anderson, each of whom without privity of contract with any one claiming under the Maish-Gordon contract, are set forth respectively in Findings IX, X, XI, and XII.

Findings XIII and XIV set forth respectively the services of Marion Butler and Josiah M. Vale.

Finding XV relates to equitable assignments under the Maish-Gordon contract in favor of Gwydir, Edwards, and Hall, the courts specifically pointing out, however, that "*it does not appear that they rendered services to the Indians.*"

Finding XVI relates to an assignment by said Hall to Magee, in which there was a like finding.

The intervening petitions of Gwydir, Edwards, Hall, and Magee, setting up the equitable assignments of appellee forming the subject-matter of findings of fact XV and XVI (R., 212), were dismissed by the Court of Claims (R., 222), as not presenting matters within the jurisdiction of the court, considering as it was claims *against the Indians* and not claims against the fund allowed in the name of appellee as against said Indians.

Thus it will be observed that the appellee's first defense is not only rebutted by the language of the written contract the fact of whose execution he acknowledges, "*whether allowed under the Maish-Gordon contract \* \* \* or any other theory,*" but there also appears from this Exhibit A, a part of appellee's answer, certain further facts inconsistent with and antagonistic to all of appellee's asserted theories of defense, namely:

- (a) That appellant "became interested in the matter of the claim of said Indians through the solicitation of Hugh H. Gordon *under the Maish-Gordon contract* in the latter part of 1903 or 1904;"
- (b) That the written contracts between appellant and appellee were not before the Court of Claims, the second paragraph of Finding VIII being: "*It does not appear* that said Robertson entered into any contract with any one as to compensation for his services" (R., 208); and said court did not find or attempt to exercise jurisdiction to hear or determine the merits of the contractual obligations existing between appellant and appellee;
- (c) The use by appellee of the \$150.00 for expenses in coming to Washington constituted the basis for the only service to the Indians for which he was credited by the Court of Claims, occurring subsequent to the expiration of

the Maish-Gordon contract, July 25, 1904, and this service of appellee constituted an important factor in the allowance made by the court in the name of appellee;

(d) The Court of Claims (in its opinion so exhibited, R., 214-222) treated the controversy *as one between the attorneys and the Indians*, expressly refused to adjudicate the merits of such equitable assignments of appellee as were submitted by interveners, made an award of \$60,000 as the value to the Indians of the services of all the attorneys having privity of contract with the Indians, found that such privity of contract was traceable only through the Maish-Gordon contract, and apportioned this amount among such attorneys, including appellant, according to the court's view of the value of their services severally to the Indians, and without considering or determining the merits of the claims of any one holding equitable assignments against the interests of any of said attorneys or attempting to pass upon the partnership or other contracts which may have existed between attorneys in whose names the awards were made.

To this amended answer appellant filed his replication (R., 43).

### **Proof.**

The material allegations of the bill were all proven, including the execution by the appellee of the equitable assignment of March 21, and the contract of March 28, 1906.

The burden was then placed upon the appellee to substantiate, by proof, his two grounds of affirmative defense to the principal claim of appellant, and his one ground of defense to the equitable assignment for \$150.

These defenses will be more particularly discussed in the argument. It is sufficient to say, in this connection, that no testimony was introduced on behalf of the appellee except his own deposition and certain correspondence.

In his deposition he admitted (R. 129) that on the date of the execution of the contract of March 28, 1906, the conditions were such that the execution and approval of a new contract with the Indians was impossible. All communication between the parties leading up to the time of the contract of March 28, 1906, was had by correspondence, either between the appellee and appellant or appellee and Gwydir, except in so far as Gwydir acting as the agent of appellee communicated directly in person with appellant. Some of the letters passing between appellee and Gwydir and appellant had been destroyed and were, therefore, not introduced (R. 100-101). The appellee could not recall and did not attempt to state the contents, as such, of any letter which had been mislaid or destroyed; and all of the correspondence remaining in the possession of appellant, appellee or Gwydir of a date anterior to said contract of March 28, 1906, appear in the record.

No one of these documents was inconsistent with or tended to vary or alter the terms of said written contract; but some of them were inconsistent with the contention of appellee that all services rendered and expenditures made by appellant anterior to its execution were rendered and expended solely upon the idea and subject to the condition that a new contract with the Indians should be obtained by appellant and approved by the Secretary of the Interior as a condition precedent to any right on his part to compensation from appellee.

Said correspondence, as a whole, was entirely consistent with the idea that appellant had for nearly two years, in consultation with Gwydir, the agent of appellee, and in correspondence with appellee and otherwise, been bestowing services and making expenditures in the interest and of essential benefit to appellee, and with the expectation that his claim therefor would be recognized and respected by appellee in an honorable and proper way at the proper time; and the written agreement of March 28, 1906, is entirely

consistent with the contention of appellant that the same was based upon valuable consideration, including services to appellee and unsecured expenditures theretofore bestowed for appellee as well as his valuable services and co-operation in the immediate future; but the contract itself contains all the elements necessary to its validity and to repel attack by parol under the pleadings.

### **Correspondence Chronologically Arranged.**

For the convenience of the court in reviewing the correspondence introduced or exhibited, occurring prior to the execution of the contract of March 28, 1906, the same is here specifically referred in chronological order. Letters or telegrams from appellee to Gwydir, dated April 24, 1903 (R., 151), February 2, 1904 (R., 153-4), March 17, 1904 (R., 164), April 16, 1904 (R., 155), April 19, 1904 (R., 158), April 22, 1904 (R., 159-160), April 23, 1904 (R., 164); letter from Gwydir to appellee of April 25, 1904 (R., 25); letters of appellee to Gwydir of April 27 and 28, 1904 (R., 158); letter from appellant to appellee of May 9, 1904 (R., 98, 99) (*beginning of relations between appellant and appellee*); letters of appellee to Gwydir, July 9, 1904 (R., 163), and December 18, 1905 (R., 160); Gwydir to appellant of December 4, 1905 (R., 167); appellee to Gwydir of December 18, 1905 (R., 169), also form of extension agreement dated December, 1905 (R., 166); appellant to appellee of January 8, 1906 (R., 168); appellee to appellant, February 8, 1906 (R., 170), and of March 8, 1906 (R., 173); appellant to appellee March 10, 1906 (R., 173); appellee to appellant of March 10, 1906 (R., 87); appellant to appellee of March 20, 1906 (R., 87); and appellee to appellant same date (R., 87), with equitable assignment of March 21, 1906 (R., 86), and appellee to appellant of March 23, 1906 (R., 88).

### **Appellee's Desperate Condition.**

Before entering into a more detailed presentation of this correspondence, attention is called to the undisputed facts appearing from the record in this cause and from public documents of which this court will take judicial knowledge, showing that the interests of appellee were in a very desperate condition anterior to the execution of said contract of March 28, 1903, and that the activities and expenditures by appellant *in the individual interest of appellee* in the premises were essential to the financial results favorable to appellee which followed.

While the point was never raised, appellee was disqualified by his official connection with the United States as a major in the army, when the Maish-Gordon contract was accepted January 20, 1899, and between the time of the death of Maish, in February, 1899 (R., 207), and the date of appellee's honorable discharge from the army, April 30, 1899, there was no one in whom the title to the contract could stand, according to the then theory of a co-partnership with Maish.

With the exception of employing Henderson and May in 1900 to prosecute the claim and joining with them in the employment of Butler in 1902 or 1903 (R., 211), and having his father come on to Washington in 1902 or 1903 (R., 297-8), for about ten days, appellee had practically done nothing under the contract, which was to expire by limitation July 25, 1904.

Under authority of the Acting Secretary of the Interior, dated December 8, 1898, the Commissioner of Indian Affairs had, under date of December 12, 1898, given general instructions, "to all Indian agents," that:

"Indian agents are hereby directed not to allow the negotiation of such contract (for the employment of attorneys or agents) with the Indians under their charge unless explicitly advised by this office that prior authority therefor has been granted."

Though repeatedly requested, through his associates in Washington, appellee was unable to get the necessary authority to go on or send to the reservation for the purpose of negotiating with the Indians either a new or the extension of the old Maish-Gordon contract.

As afterwards developed, one E. C. McDonald, in co-operation with A. M. Anderson, the former Indian agent, without authority from the Indian Commissioner, negotiated a purported agreement with the Indians in 1904, employed Judge Merritt, J. Gordon, and Mr. Richard W. Nuzum, who brought on a delegation of Indians to Washington; and, in co-operation with Messrs. Butler and Vale, under arrangements made with them, presented the Indian claim before Congress in the year 1905, all of which appears from Findings IX, X, XI, and XII of the Court of Claims (R., 202-210), constituting part of Exhibit A to the answer of appellee.

A proposed amendment to the Indian Appropriation Bill (H. R. 17474, 58th Congress, 3d Session) was introduced in the Senate for Senator Foster of Washington, February 3, 1905, proposing an appropriation of \$1,500,000 in payment of the claim, without any provision being made for counsel fees under the Maish-Gordon contract. The response of the Interior Department to a reference of this amount was adverse to allowance of counsel fees. The Commissioner of Indian Affairs in his communication to Senator Stewart, as chairman of the Senate Committee on Indian Affairs, under date of February 11, 1905, stated that the Maish-Gordon contract had expired July 25, 1904.

By House Ex. Document No. 332, 59th Cong., first session, it will be seen that, pursuant to authority from the Commissioner of Indian Affairs, dated April 25, 1905, United States Indian Inspector McLaughlin was sent to the Colville Indian Reservation, where he negotiated an agreement with the Indians of December 1, 1905, for the opening of the south half of the reservation for settlement, after allot-

ments should be made to the individual Indians; that by article I of this agreement provision was made for the fulfillment by the Government of its agreement of 1891 in the payment of \$1,500,000 for the north half of the reservation; no specific provision being made, however, for the payment of counsel fees, and that this agreement was transmitted by the Secretary of the Interior to Congress for ratification and fulfillment January 8, 1906.

In the light of this, Senator Ankeny, on March 15, 1906, submitted (Cong. Record, 3838) a proposed amendment to the Indian Appropriation Bill, No. 15331, providing for the fulfillment of the agreement with the Indians, dated May 9, 1891, by setting aside in the Treasury for their use the said sum of \$1,500,000, but without making any provision for the payment of counsel fees.

Meanwhile appellee, suspicious and distrustful of his associates in Washington, was residing in the South, engaged partially in farming and partially in the practice of law, wholly out of touch with what was going on in Washington and without the knowledge of conditions or means at hand, either to serve the Indians himself or to protect his own interests upon the basis of the service rendered in their behalf by appellant subsequent to the expiration of his contract, July 25, 1904, at appellee's instance—all of which will more fully appear by the correspondence to which specific reference has been above made.

### **Preliminary Correspondence With Gwydir.**

R. D. Gwydir of Spokane, Washington, in association with Edwards and Hall, had negotiated the original Maish-Gordon contract and Gwydir, Edwards, and Hall held an equitable assignment of that contract from Maish and Gordon, dated June 15, 1894, to the extent of 6 45ths interest of the amount to be recovered as counsel fees, to be equally divided among the three (R., 212).

The aforementioned letters from appellee to Gwydir, beginning with one dated April 24, 1903 (R., 151), show that, in anticipation of the expiration of the Maish-Gordon contract on July 25, 1904, appellant sought some means of conserving his own interest in the premises, his plan for doing so varying somewhat in each letter; his idea being, if possible, to get a new contract in the name of some one other than himself and, failing in this, to secure an extension of the Maish-Gordon contract; but giving Gwydir broad authority to represent his interests in the West. He states in the first letter (R., 153), "*We will take care of such of your friends as you may wish us to provide for.*"

The plan of appellee, in getting the contract in some other name, was to recognize only those outstanding claims whom he desired to recognize, and, further, by the use of prominent names, he at first hoped that the efforts for a new contract might be aided. In his letter of April 24, 1903 (R., 152), he suggested the name of his father. In the next letter of February 2, 1904 (R., 154), that of Hon. Hoke Smith; but later, his letter of April 15, 1904 (R., 155), that of "R. D. Gwydir & Associates," expressing faith in the influence of Gwydir's name with the Indians. The same idea was adhered to in his next letter of April 22, 1904 (R., 156), in which he spoke of having received a letter from Butler and Vale, enclosing form of proposed contract to a party with whom appellee had no contractual relations and stating that Butler and Vale "could not take the contract" without the sanction of the Interior Department. In this letter appellee frankly admits that he has no hope of getting such new contract approved by the existing administration of the Interior Department and unfolded, as his plan, that the contract be taken in the name of "R. D. Gwydir and Associates," saying: "*then we will quietly pigeon-hole the contract until there is a change of administration or at least a change of Secretary of Interior,*" before the same is taken up for approval. Appellee's letters of August 24, 1903 (R.,

151), and February 2, 1904 (R., 153), contain certain glaringly improper suggestions, reflecting we think upon the credibility of appellee, and great secrecy was enjoined; but his letter of April 22, 1904 (R., 159), was free of such expressions, and the suggestion was made that Gwydir consult "*some personal friend who is a good lawyer.*"

Shortly after this, under date of May 9, 1904 (R., 98-99), appellant wrote appellee that Gwydir had sought his assistance, explaining the status of the matters on the reservation as he understood them, and seeking more detailed information from appellee. The reply of appellee to appellant does not appear in the record; but in appellee's letter to Gwydir, dated July 9, 1904 (R., 163), appellee stated that he had written fully to appellant; that his assignment to May and Henderson of 25 per cent in the old contract, "had expired by limitation;" that his contract with Butler and Vale was also invalid, "yet it may be policy for us not to break with them." He further stated that in his letter to appellant he had explained his "financial straits," his inability, "to advance more money" and suggested his willingness to make "a liberal division of the interests in the contract" such as "would enable him to unhesitatingly advance the amount needed to pay" Gwydir's "expenses."

### **New Contract Impossible; Service Invaluable.**

In the absence of departmental authority to negotiate the execution by the Indians of a new or the extension of the old contract, appellant did the only practical things which could be done in the interest of appellee, first, guarded as far as practicable against the execution of a new contract in favor of any one else; and, second, rendered honest service to the Indians, under authority from appellee, by which appellee could alone contend that service for the Indians had not been abandoned upon its expiration by limitation—the

sole ground upon which Congress could be expected to or did thereafter sanction its extension by statutory enactment.

In addition to his individual services and expenses in this regard, he bore the expense of and sent Gwydir to the reservation while Inspector McLaughlin was negotiating the agreement of December, 1905, and advised them to stand firm and not consent to the wishes of the Government with respect to the south half of the reservation, *except upon the positive agreement that the prior agreement of 1891 should be fulfilled in respect to payment for the north half* (R., 62-3, 167-8); and this plan was successful and the agreement in this particular of December 1, 1905, became the basis for the favorable action by Congress, on which the counsel fees were alone allowable.

### **Relations and Character of Service for Appellee.**

It is true that appellee was continuously harping upon the importance of a new contract or the extension of the old as the only means he could think of for protecting his interests; but the existing regulation requiring official permission made this impossible; and had he known the status of affairs in Washington, even he would have seen that such efforts would be worse than futile. His basic idea, however, was that *appellant and Gwydir should protect his interests*. In his letter to the latter of December 18, 1905 (R., 160-163), he said:

"I have *never* in my life dealt in bad faith with any one and you may rest assured I will take no step affecting our mutual interests without conferring with you and keeping you fully posted. \* \* \* I would write directly to Mr. Robertson, as you suggest, if you had given me his address."

He then rehearsed terms which he said he had previously written Gwydir to the effect that appellee would share equally with appellant and Gwydir in the ultimate re-

coveries, but deemed it well that a percentage equal to the combined interests of appellee and appellant and Gwydir should be set aside out of which to compensate Washington counsel.

In his letter to appellee, dated January 8, 1903 (R., 168-170), appellant explained the status of affairs in the West, as best he could, spoke of the unapproved Maedonald contract and of the attorneys interested with him and said:

"I went to Maedonald, and informed him of *my association with you and Major Gwydir*, and stated that if he had a proper contract, and would protect us on proper lines, we would endeavor to work together, but I got no favorable response," etc.

In this letter appellant suggested, among other things, that the other contract be looked up and that, in opposition thereto, appellee should say: "That you procured Major Gwydir's assistance, *and had never abandoned your contract.*"

The letter concludes with the following expressions:

"I suggest these matters to you, and will now act in any way that you think will protect you. \* \* \* I am anxious, first, to protect ourselves." (Italics supplied.)

In the postscript to this letter (R., 170) appellant said:

"Since writing the within letter I have had a talk with Mr. Richard Nuzum over the matter, telling him how Anderson had treated us, and he claimed to be acting in connection with Marion Butler, who claimed to have had a complete assignment of your original contract. *I told him that if we got to fighting there was little chance to do anything*, and so far as I was concerned I was going to lay the facts fully before some of my friends in Congress to protect our interests. Nuzum asked me to wait before sending to you any letter, and that he would try and adjust the matter and try and take care of *you, myself and*

*Major Gwydir.* \* \* \* I think we can form some alliance with them. Major Gwydir saw McLaughlin, and he claimed that our claim would be taken care of under the old contract; that he had information to that effect from Washington." (Italics supplied.)

Appellee's reply to this letter of February 8, 1906 (R. 170-173), in no way dissents either from the *idea* of appellant that he is then interested under the original Maish-Gordon contract or that a policy of co-operation among conflicting interests for the protection of all is not desirable, except that he expresses little confidence in the other side being willing to concede anything. He denies that he made a "complete assignment of the original contract" to Butler, but admitted that his contract with Butler constituted an assignment of a part interest in the original contract, and, under certain conditions, an interest in such new contract as might be negotiated. He explained why he had preferred that any new contract should be in the name of R. D. Gwydir and associates, saying:

"I felt that you and Gwydir were honorable gentlemen whom I could unhesitatingly trust, and my faith in you is still absolutely unqualified."

Responding to the suggestion of appellant in respect to proceedings in court on behalf of the Indians, appellee says:

"My impression is that the Indians cannot inaugurate suit against the Government, without the consent of Congress. There are, I think, but two avenues for redress open to them. One is to secure by a bill in Congress a direct appropriation for the payment of their claims; and the other is to secure by bill or 'joint resolution' reference of the claim or the case to the Court of Claims." (Italics supplied.)

He then proceeds to discuss the main object, the protection of the interests of himself, and, among other things, appellee says:

"In view of the complications which have arisen since we first decided to try for a new contract, it is an exceedingly difficult thing to determine what is *our wisest course* \* \* \* but as we did not secure the new contract *we will have to do the best we can under present conditions.*

"It would of course be a most excellent thing for us if we could secure the permission of the Department to go on the reservation and make a new contract with the Indians. But I am not at all sure that the Department will give in advance its official sanction to a proposed contract \* \* \* at any rate if it can be secured I am satisfied that it will be necessary for me to go to Washington and attend to it personally—I don't believe anything can be accomplished by correspondence.

"But the difficulty about this program is that I actually haven't the \$150,000 with which to pay the expenses of that trip—my losses from cold and flood during the past eighteen months have left me in such financial straits that I am borrowing money with which to replant my crops and take care of my growth \* \* \*,"

He then makes inquiries showing utter ignorance of the status of affairs as between the Indians and the Government, and proceeds:

"Who is McLaughlin and what does he mean by his statement to Gwydir that he (McL.) had advices from Washington to the effect that *our interests under the old Maish-Gordon contract* would be protected? \* \* \*

"The truth is I am so much in the dark as to the exact situation out there and in Washington, that *I cannot advise you or counsel you intelligently*—I have no faith whatever in any promises from those other parties to take care—*our interests* \* \* \*. If you can give me any comforting news I would be glad to have you do so." (Italics supplied.)

Appellee having wired appellant March 8, 1906 (R., 173), for the \$150.00, appellant wrote appellee, under date of March 10, 1906 (R., 173-174), among other things, saying:

"I enclose herewith a draft for \$150.00 which will enable you to go to Washington, *and protect our interests there.* I do not believe that without a recognition of your contract any subsequent contract with the Indians can be put through over your opposition \* \* \*. *It may be several bills are pending in Washington,* but their character can be examined by you better than by me. If you need any assistance to protect *us* and you bring *our* interests to the attention of Senators McHenry and Foster in the Senate, and *my* interest to Senators Aukeny, Piles, and Du Bois in the Senate, and I am satisfied that they will protect *our* interests to the extent that you can show that we are entitled to their protection under the rules of equity and good conscience. If you desire me to get additional agreements with the Indians here on your arrival at Washington, wire me fully, and I will send a representative there. I am unable, however, to spend much money in this matter \* \* \*.

"It is reported that Mr. Nuzum and Judge Gordon are starting to Washington to be presented to the President about the 20th of this month. You should be on the ground there and protect your interests. Mr. Brusard of Louisiana, and my brother, S. M. Robertson, and other Louisiana delegates, together with men who know you and me would undoubtedly *protect us in this old agreement* if they believed we were justly entitled to compensation. *I believe that an approved agreement such as you have, is much better than another approved agreement such as Anderson had;* they rely on Senator La Follette, who is a friend of Mr. Nuzum, and other influential Senators, to take their view of the matter.

"I would not precipitously start a fight against Anderson, for this might preclude any consideration of the attorneys' fee but I would *size the situation up carefully,* and if *our* interest is not to be protected, *then I would oppose him.*" (Italics supplied.)

In his letter to appellant, of the same date, March 10, 1906 (R., 87), appellee said:

"We ought to have a well-defined program of the campaign we propose to make in Washington and *it is a great pity that our consultations must be had through the very slow and unsatisfactory medium of correspondence.* You and Gwydir who are on the ground must strengthen my hands with the strongest case you can make out and you must also write me fully making such suggestions as may occur to you." (Italics supplied.)

On March 20 appellee wired appellant (R., 87) as follows:

"Detained in court till after April 3. Notify Nuzum."

On March 21 (R., 86), appellee signed and presumably mailed to appellant the aforesaid equitable assignment in the form of his receipt for \$150.00—

"with which to pay expenses of trip to Washington, D. C., to look after the interests of Gordon, Gwydir and Robertson in the matter of the claim of the Indians \* \* \* in case we succeed in collecting said claims I agree that out of my share of the profits I will repay to said Robertson the said \$150.00."

### **Considerations for Contract, March 28, 1906.**

With the exception of the telegrams of appellee to appellant of March 23, the above correspondence is everything in writing in the record antedating the contract of March 28, 1906.

From these, as well as the contract (R., 4) itself, it will be seen that the rights of appellant thereunder were not conditional upon the admittedly impossible and useless thing of securing a new contract subsequent to the date of its execution.

It also clearly appears that the consideration for the con-

tract of March 28, 1906, passing from appellant to appellee included the following:

- (1) For services rendered appellee *personally* by appellant from the spring of 1904;
- (2) For expenses incurred *as paid by* appellant in the premises, exclusive of the advance of \$150,000;
- (3) For the services of appellant to the Indians as local professional representative of appellee in the State of Washington;
- (4) For the personal expenses incurred and growing out of the services to be rendered by appellant to appellee, as well as the Indians, by his then trip to Washington;
- (5) For the agreement by appellant "to compensate R. D. Tawydril by a reasonable compensation" for his services.

In the absence of a crossbill or other form of pleading attacking the validity of this contract of March 28, 1906, it is deemed unnecessary to set forth the clearly inadmissible testimony of appellee in respect to alleged facts inconsistent with the terms of the written instrument itself, except to refer to the following admission (R. 127) of appellant:

"After my arrival here, and after ascertaining the exact status of affairs here, I of course knew that no new contract could be secured."

### **Developments Subsequent to March 28, 1906.**

Agreeably to the provisions in the contract to the effect that "both parties hereto mutually labor to secure such allowance" as well as the idea involved in their previous negotiations with Nuzum, there ensued conferences between the various attorneys, representing conflicting interests, on the subject of fees, all of whom were vitally affected by having some further amendment made to the Indian Appropriation Bill, whereunder the services of counsel should be recognized and paid, or therefor authorized by Congress before the bill should finally pass, carrying out the earnest desires

of the Interior Department and certain members of Congress to insure the allotments in severalty and throw open the reduced reserve to settlers under the public-land laws of the United States.

### **Conference Committee Stipulation.**

The first plan was for the attorneys to all join in a request to the Conference Committee, having the bill in charge, to fix the amount of the award to counsel *based strictly upon the value of services to the Indians*, and, accordingly, an agreement or stipulation was entered into in writing, under date of April 3, 1906, providing that, "*in case no award shall be made the rights of the said parties shall remain unaffected.*"

This agreement (R. 124) reads in full as follows:

"The undersigned hereby stipulate and agree that their respective claims for services rendered the Colville Indians be submitted to the Conference Committee of the Senate and House of Representatives on a *quotation merit*, and agree to stand to and abide by any award which shall be made in the premises, and in case no award shall be made the rights of the said parties shall remain unaffected."

"This the 3rd day of April, 1906,

"HORACE H. GOMBOX,

"*For Himself and Associates*

"MARION BUTLER,

"*For Himself and Associates*

"F. C. ROBERTSON,

"BUTLER & VALE,

*All Services Subsequent to Formation  
of Copartnership.*"

(Italics supplied.)

Upon being submitted to the committee, or members thereof, counsel were advised that the committee would not undertake to pass upon the claims of counsel, and the agreement became void and of no effect, according to the terms thereof.

## Raleigh Hotel Agreement.

Then ensued further conferences between counsel, with the result that another stipulation or agreement was entered into, known as the "Raleigh Hotel" agreement, dated April 12, 1906 (R., 120-121), which reads in full as follows:

"WASHINGTON, D. C., April 12, 1906.

"This agreement made and entered into between Marion Butler on his own behalf and on behalf of his associate counsel, R. W. Nuzum, on his behalf and on behalf of his associates, and *Hugh Gordon and F. C. Robertson*; witnesseth:

"That wherefore, each of said parties mentioned herein have rendered services as attorneys for the Colville Indians and claim the right to participate in *any appropriation made* to pay said attorneys' fees;

"Now, therefore, provided, the sum of one hundred and fifty thousand (\$150,000) dollars is allowed for the payment of attorneys representing said tribe of Indians then of the said sum eighteen thousand seven hundred and fifty (\$18,750) dollars is to be paid to the said R. W. Nuzum for himself and associates and nine thousand three hundred and seventy-five (\$9,375) dollars to *Hugh Gordon* and nine thousand three hundred and seventy-five (\$9,375) dollars to *F. C. Robertson*; the remainder of said sum to be distributed by the said Marion Butler as he elects. *Should the appropriation be less*, then this agreement is to be the basis of the distribution, sharing *pro rata* in such diminished sum, as the percentage is thereby diminished.

"In witness whereof we have heretofore set our hands and seals at the City of Washington, the day and date above written,

"R. W. NUZUM. [SEAL.]  
"HUGH H. GORDON. [SEAL.]  
"F. C. ROBERTSON. [SEAL.]  
"MARION BUTLER. [SEAL.]"

(Italics supplied.)

It will be observed that in the introductory paragraph appellees are mentioned practically as parties<sup>\*</sup> of the third part; the amounts to be received thereunder were the same, and this contract in no way conflicted with or modified their existing contract of March 28, 1906. Even the appellee admits that they were to be construed together. Appellant (R., 134) said:

"I construed the *two contracts* (of March 28 and April 12, 1906) *as one*" etc.

(Italics and parenthesis supplied.)

Shortly after the execution of this Raleigh agreement, and before final action by Congress, appellant returned to his home at Spokane, leaving the matter before Congress in the hands of counsel remaining, including appellee.

### **Jurisdictional Statute Enacted.**

On April 13, 1906, the Senate committee favorably reported the Ankeny amendment (Senate Report, No. 2561, p. 134), as set forth above, with the following words added:

"Of which sum one hundred and fifty thousand dollars is hereby appropriated, out of any money in the Treasury not otherwise appropriated, for the benefit of said Indians."

The Ankeny amendment, as amended by the committee, was agreed to by the Senate when the bill came up for consideration, during the consideration of the measure April 21, 1906 (Cong. Record, p. 5798), which bill, as amended, passed the Senate April 28, 1906 (Cong. Record, p. 6056).

On May 7, 1906, the House disagreed to Senate amendments (Cong. Record, 6463), and the Senate insisted on all amendments and appointed conferees (Cong. Record, p. 6437).

On May 25, 1906, on conference report (H. R. Report 4436), the House receded from its disagreement to amendment of Senate No. 191 (Ankeny amendment as offered),

and agreed to same, with an amendment, as an addition thereto as it originally passed the Senate and which constitutes the item conferring jurisdiction on the Court of Claims, and reads as follows:

"And jurisdiction is hereby conferred upon the Court of Claims to hear, determine and render final judgment *in the name of Butler and Vale* (Marion Butler and Josiah M. Vale), attorneys and counsellors-at-law, of the city of Washington, District of Columbia, *for the amount of compensation which shall be paid to the attorneys who have performed services as counsel on behalf of said Indians in the prosecution of the claim of said Indians for payment for said land*, and in determining the amount of compensation for such services the court *may consider all contracts or agreements heretofore entered into by said Indians with attorneys who have represented them in the prosecution of said claim*, and also all services rendered *by said attorneys* for said Indians in the matter of said claim. Petition hereunder shall be filed in said court by the said attorneys (Butler and Vale), within thirty days from the passage of this act, and the Attorney-General shall appear on behalf of the defendants, and said cause shall be given preference for immediate hearing in said court; and the Secretary of the Treasury is hereby authorized and directed to pay the *sum of money so awarded by said court to the said attorneys (Butler and Vale)*, upon the rendition of final judgment, out of the said sum *herein set apart or appropriated for the benefit of said Indians*, and payment of said judgment shall be in full compensation to all attorneys who have rendered services to said Indians in the matter of their said claim, *the same to be apportioned among said attorneys by said Butler and Vale as agreed among themselves*; *Provided*, That before any money is paid to any attorney having an agreement with Butler and Vale as to the distribution of said fees, each of the same shall execute and deliver to the Secretary of the Interior a satisfaction and discharge of all claims and demands for services rendered said Indians in the matter of their said claim."

(Italics supplied.)

### Attitude and Action of Appellee.

On May 26, 1906, next day after the adoption of the committee report, appellee Gordon, from Washington, D. C., wrote to Gwydir (R., 183) and to appellant (R., 88) requesting each of them to send on to Butler and Vale the original Maish-Gordon contract, saying to Gwydir that—

"Butler and Vale say they will need all these copies to put our case through the Court of Claims, to which it has been referred."

Appellee admits it was his purpose at this time that Butler and Vale should file the petition under this jurisdictional statute before the Court of Claims, conduct the proceedings, and that the distribution of the fund to be allowed all counsel should be made under the Raleigh agreement (R., 130).

The bill as thus amended passed the Senate June 11, 1906 (Congressional Record, 8264), and the House June 12, 1906 (Congressional Record, 8352), and was approved by the President June 21, 1906 (34 Stats. at Large, 377-378).

Within the thirty days prescribed by the statute, to wit, on June 23, 1906, Butler and Vale filed a petition in the Court of Claims (R., 222-226) against "The United States; The United States, Trustee for the Indians Residing on the Colville Reservation, and the Indians Residing on the Colville Reservation Known as the Colville Indians." The petition referred to the statute both for the authority of petitioners and the jurisdiction of the court, made no specific reference to the Raleigh agreement, craved judgment in names of petitioners for the value of the services to the Indians of all counsel, and claiming \$225,000.

In line with the theory of the petition that the judgment was to be made in the name of petitioners for the aggregate

value of the services of all counsel to the Indians and by petitioners apportioned among counsel. Butler and Vale promptly took up with appellee and appellant the matter of making proof of the services for the Indians severally performed by them, and as to the appellee apparently in harmony with their understanding with him before he left Washington, as indicated by appellee's letter to Gwydir (R., 183) and his testimony (R., 130) as to his purpose at that time.

Letters of Butler and Vale to appellee, dated June 27 and July 5, 1906 (R., 237), the latter enclosing printed copy of petition and both calling for statement of services of Maish and Gordon, were responded to by appellee on July 10, 1906 (R., 237), in which he said:

"At present I am on the sick list; but as soon as I am well enough, I will prepare and forward you a statement in regard to services rendered by Maish and Gordon to the Colville Indians."

This was followed up by a card from appellee to Butler and Vale, reaching Washington July 21, 1906, in which he (R., 238) said:

"I think, upon reflection, that you had best hurry forward such interrogatories as you propose sending me. I am going North in about ten days, so please forward by first mail."

### **Appellant's Conduct.**

Previously to July 25, 1906, Butler and Vale had evidently written appellant along the same lines as appears in the opening paragraph of their letter to him of that date (R., 176). In the reply of appellant, dated August 1, 1906 (R., 177), he explained the facts, including a statement of his contractual relations with appellee, referred to the \* Raleigh agreement and indicated that if there was any question about his sharing in the ultimate distribution in

accordance with both, he wanted Butler and Vale to say so; and he would employ "attorneys in Washington" saying, among other things further (R., 178) that: "*If I have to make my own case, I shall make it in my own way.*"

It does not appear that there was any written response to this communication; but it does appear, by the testimony of appellant (R., 75), that in the fall of 1906 Mr. Anderson, representing the Government and the Indians, and Mr. Vale, representing petitioners, went to Spokane and took testimony, "showing all of the services rendered by all the lawyers," including the testimony of appellant "as to the services I (he) had rendered."

As to the understanding of appellant on that occasion he testified further (R., 75) as follows:

"I then asked Mr. Vale, 'Mr. Vale, what is your construction of this act? Should I intervene in the court, or Gordon intervene?' and he said, no, that all intervention would be stricken out, in his opinion, and he thought we would complete matters in the case, and further told me that, 'you and Gordon are protected under your contract with us, and we will carry it out in full.' This contract was left with Mr. Vale or Mr. Butler when I left (Washington) signed by everybody, but I had no copy and hence relied on the copy retained by Butler & Vale; and on October 3, 1906, I wrote a letter to Mr. Gordon."

This letter from appellant to appellee is in evidence (R., 99), and shows that there was transmitted with it a copy of all the testimony taken in Spokane, including that of appellant. In this letter appellant, among other things, said:

"I understand that our contract was fully executed by Butler and Vale, and therefore I cannot see how we would be benefited by doing anything except aiding them in this matter, as they must protect us under the written agreement \* \* \*. I suggest that owing to the great expense of going to Washington and protecting our interests, and owing to the positive admission of Mr. Vale that we are protected

by the contract with them, we had best leave this matter entirely in their hands."

Proceeding with his testimony, appellant (R., 75) says:

"I never heard from Mr. Gordon in response to that letter and *believed that he was acting under it at all times.* I never knew that he was going to appear in the Court of Claims by an intervening petition. In fact, I was never informed by Mr. Vale or Mr. Butler or by Mr. Hugh Gordon or by anybody else of any steps of that kind being taken, so I took no steps to submit before the Court of Claims my contract with Mr. Hugh Gordon mentioned, and it was not produced at any hearing or anywhere else."

### **Change of Attitude by Appellee Without Notice to Appellant.**

As the facts afterwards developed, a disagreement sprung up between appellee and Butler and Vale, due to a refusal on the part of the latter to execute a supplemental agreement (R., 236) submitted by appellee to them, obligating Butler and Vale to proportionately increase the amount of fees to counsel, under the Raleigh agreement, in the event the judgment of the court should exceed \$150,000.

The hostility of appellee to Butler and Vale seems to have been manifested when his deposition was taken December 13, 1906 (R., 233). This was followed up, and *after the testimony had been concluded*, by an intervening petition before the court, verified by the oath of appellee, and filed October 31, 1907 (R., 226). In that petition he averred that he was not a partner of Maish, denied the authority of Butler and Vale to receive any fund apportionable to himself or those holding subcontracts with him, objected to the failure of Butler and Vale to make him a partner, and averred that the petition had been filed "*without his consent or agreement.*" In this petition no averment was made antago-

nistic to appellant (their contract of March 28, 1906, providing for equal division of funds, "no matter in whose name such allowance is made"); nor was appellant made a party to the petition or given any notice thereof.

While asserting in paragraph 7 "that it is to his interest to have his right and claim to attorneys' fee or compensation for such services specifically decreed or adjudged by the court in his own name and behalf," he specifically avowed his intention to carry out his obligations to others, the next paragraph of the petition (R. 228) reading as follows:

"8. That it is not the wish or intention of your petitioner to disclaim the right to compensation to such persons or attorneys as rendered services under subcontracts with Maish and Gordon in the former's lifetime or under subcontracts entered into by your petitioner subsequent to Maish's death, but *it is the desire of your petitioner that such obligations shall be faithfully carried out according to the terms and letter thereof.*"

Appellee admits in his testimony (R. 133) that he asserted the right, before the Court of Claims, to receive the total award against the Indians, except for Maish's administrator, and to make his own settlements with all others holding contracts with him.

### **Appellee's Concealments.**

It will be observed that appellee carefully refrained from raising any issue between himself and appellant or any other subcontractor with him; neither did he furnish appellant with a copy of the intervening petition. On the contrary, in his confidential letters to Gwydir, written shortly thereafter (R. 179-182), he was carefully concealing from appellant the fact that he proposed to dispute his claim, and was particularly anxious that no controversy of that character should come up before or have to be ad-

judicated by the Court of Claims in advance of judgment. In his letter of November 18, 1907 (R., 181), appellee said:

"Be especially careful to say nothing to Robertson," etc.

In his letter of December 19, 1907 (R., 182), on the subject of inadvisability of trying differences in the Court of Claims, he said:

"If we start any divisions of the fee in the court we are liable to have a lot of complications with these claimants by these outside interlopers—if all our friends will concentrate in asking the court to pay the fee to me—which is the only legal and only right thing to do, I believe our fight against Butler and Vale, these outside schemers, will be greatly strengthened. \* \* \* I will tell you all about Robertson when I see you—in the meantime you may rest assured that I know whereof I speak—but keep your own counsel about this and steer clear of any deals with him.

"Treat my letters and all I say to you as strictly confidential—I believe we will win the fight here."

#### **Appellant Did Not Intervene, Set Up Contracts with Appellee, Seek or Expect Award in His Own Name.**

After the conclusion of the taking of testimony before the Court of Claims and *long after* the deposition of appellee given in Florida in December, 1906, but *before the intervening petition was filed by appellee in October, 1907*, appellant first saw a copy of the deposition *in April, 1907*. In view of appellee's change of attitude and uncertainties engendered, appellant promptly went before a notary public in the presence of United States Attorney Avery and made a statement and exhibited thereto his said contracts with appellee of March 21 and 28, 1906. His action in this regard appears in his testimony (R., 76) and the affidavit with ex-

hibits (R., 85-87), but it appears in the concluding paragraph of the sworn statement (R., 86) that the United States Attorney refused to participate in the proceedings.

The appellant further testified (R., 76) that he promptly prepared two letters—one addressed to Hon. George M. Anderson, Assistant Attorney-General (R., 175), and the other to Messrs. Butler and Vale (R., 175)—neither of which were mailed to the parties addressed (as erroneously assumed by the Court of Appeals), but both to Mr. George H. Patrick, whom appellant had employed as his individual counsel in Washington. The letter of transmittal to Mr. Patrick (R., 176) instructs him to—

“take this deposition up with Messrs. Butler and Vale. \* \* \* I send this correspondence to you because I don’t desire to lose control of these papers, unless I know they are filed in connection with my original deposition, as they are originals and very valuable to me.”

This was all prior to the filing by appellee of his intervening petition. Discretion was left by appellant to Mr. Patrick in the premises, and this discretion was rightly exercised adverse to the filing of the same as not being within any issue presented to or within the jurisdiction of the Court of Claims to determine, except, possibly, in so far as it constituted written evidence of the privity of contract with appellee, through whom privity of contract with the Indians could properly have been traced in considering his services to the Indians in arriving at a conclusion as to the total amount of the award proper to be rendered against the Indians in the interest of all the counsel.

Appellant’s services largely antedating the written contract of March 28, 1906, he rightly connected himself with the Indians through appellee in his deposition of September, 1904, through his original employment by Gwydir as the agent of the appellee.

### **First Award by Court.**

Without any testimony being taken in support of the intervening petition of appellee and without appellant ever becoming a party to the case before the Court of Claims, that court, on April 6, 1908, entered an order which reads as follows:

"The court allows as attorney's fees in full for all attorneys in the above entitled cause the sum of sixty thousand (\$60,000.00) dollars for distribution among themselves; if they do not agree on or before the first Monday in May, 1908, the manner of distribution will be determined by the court."

Appellant was not served with a copy of this order, no agreement appears to have been made, and, accordingly, on May 25, 1908, the Court of Claims handed down its decision, including findings of fact and conclusions of law constituting Exhibit A to the answer of appellee (R. 202-222), and which have been hereinbefore mentioned somewhat in detail.

### **Appellee Repudiates all Obligations.**

Appellee construed the action of the Court of Claims upon these proceedings against the Indians as completely relieving him of all outstanding obligations, including his contract with appellant of March 28, 1906, specifically covering just such a contingency, and Butler and Vale adhered to their contention that under the jurisdictional statute they alone had a right to collect and distribute the total amount of the award. Therefore, this litigation began in the Supreme Court of the District of Columbia, the bill being filed August 26, 1908, as equity cause No. 28003.

### Cases Consolidated.

Suits having also been brought against the same officers of the Government, as well as the appellee and Maish's administrator, in equity cause No. 28000, by the Indian Protective Association; by the same complainant in equity cause No. 28001, also joining Heber J. May as defendant; by Gwydir, Edwards and Hall, in equity cause No. 28005, upon the motion of United States attorney (R., 19) said causes, together with this cause, as brought by appellant, were by order of the court (R., 20-21) consolidated, receivers were appointed, and each of said causes were dismissed as against the Secretary of the Treasury, the Secretary of the Interior, and the United States Treasurer upon the payment of the funds involved in said causes to the receivers, which payment was duly made by the United States Treasurer.

Thereupon, with leave of court, Butler and Vale filed their intervening petition (R., 30-37) in these consolidated cases, setting up their alleged right to receive and distribute the whole fund. This intervening petition, in the nature of a crossbill, was on demurrer (R., 51) dismissed, and on appeal to the Court of Appeals its dismissal was sustained (34 D. C. Appeals, 284-293).

A like course was pursued by the trial court and the Court of Appeals with regard to the cases of the Indian Protective Association *vs.* Gordon *et al.* (31 D. C. Appeals, 553-559).

No appeal was prosecuted by Butler and Vale to this court, and that of the Protective Association was dismissed, per curiam (225 U. S., 262).

### Contracts for Services to Appellee Sustained.

Prior to the consolidation, the Supreme Court of the District rendered an opinion favorable to complainants in the case of Gwydir, Edwards and Hall (36 Wash. Law Rep.,

694). This was adhered to in its final decree (R., 185), awarding to them six-forty-fifths of the combined amount awarded to appellee and to Maish's administrator. This decree was affirmed by the Court of Appeals in *Gordon vs. Gwydir et al.* (34 D. C. Appeals, 508-516), *upon the theory that the contract between Maish and Gordon and Gwydir et al. for negotiating the original contract constituted an equitable assignment of the amounts recovered by them.*

In its last-mentioned decision the Court of Appeals discussed the relation of the Maish-Gordon contract to the final award, and, among other things, said:

"Moreover, the Court of Claims found no difficulty in recognizing these contracts of Maish and Gordon in distributing the funds (p. 514) \* \* \* Now, while Maish & Gordon did not receive the compensation provided in their contract with the Indians, the same having been disregarded by Congress to that extent, *nevertheless it was the foundation of the award actually made to them.* Their services had, from beginning to the end, been performed under and by virtue of their contract, which Congress provided should be considered in making the award. *Without that contract as a foundation for the services rendered, they would have had no standing whatever in the Court of Claims.*"

(Italics supplied.)

### **Failure to Discern and Apply same Principle in Favor of Appellant against Appellee.**

In the case at bar both the lower court and the Court of Appeals of the District of Columbia wholly ignored the fact that the contract of March 28, 1906, *involved considerations passing from appellant to appellee other than that of the mere service by appellant to the Indians,* and each of said courts assumed that because appellant did his duty to appellee, as well as to all concerned, by testifying before the Court of Claims with regard to the services he rendered in

the interest of the Indians, that he therefore expected a finding for those services by the Court of Claims (by inference) in his own name, notwithstanding the undisputed fact of record that appellant assumed that the finding would be made, in harmony with the terms of the jurisdictional statute, in the name of Butler and Vale, and be by them distributed among the attorneys, and when the Court of Claims held that the Raleigh agreement and the peculiar language of the jurisdictional statute did not prevent it from doing so, and made awards in the names of appellant and appellee, appellant refused to accept the award made in his name, and promptly took these proceedings to have the combined awards made in the names of appellee and appellant brought into the proper equity court for distribution in accordance with their written contracts, and tendered his willingness to submit to the settlement of all questions involved in harmony with the principles of equity applicable thereto.

### **Opinion of Lower Court.**

On July 13, 1909, Mr. Justice Barnard rendered the opinion of the Supreme Court of the District of Columbia adverse to appellant (R., 184, 186-187).

The court first erroneously found (R., 186) that:

"This complainant not only appeared in said cause in the Court of Claims, and asked for compensation, but was there awarded \$2,000.00 as the full measure of his services in behalf of said Indians."

After quoting in full the contract of March 28, 1906, overlooking entirely the equitable assignment of March 21, 1906, the court proceeds:

"This contract strictly argued would apply only to monies that were appropriated by Congress, or allowed by the Interior Department, to one or both of these parties; and does not by its terms apply to

monies allowed by the Court of Claims for the actual value of the services of said attorneys. It was evidently made in contemplation of a direct appropriation by Congress to attorneys, or an allowance by the Interior Department under a new contract which it was contemplated might be secured, and approved by the Department. The old contract, known as the Maish-Gordon contract, had then expired, and the parties were negotiating to secure a new contract, or to secure direct legislation appropriating monies for their compensation, and to that end each of them agreed to devote his energies.

"I am disposed to believe from the testimony, and from the record, that neither of said parties contemplated the necessity of going to the Court of Claims, and filing their claims for services on a *quantum meruit* basis under such a jurisdictional act as was afterwards prepared; and that therefore the contention of this complainant, to share equally with Gordon in the award of that court should be denied."

The decree (R., 187-188), which followed agreeably to the opinion, directed the receivers to pay over to appellant the \$2,000.00 in their hands awarded to him by the Court of Claims, less three per cent commissions to receivers thereon and the costs taxed, and to appellee the \$14,000.00 awarded to him by the Court of Claims less three per cent receivers' commissions.

From this final decree an appeal was duly taken to the Court of Appeals, whose opinion, adverse to appellant, was rendered by Chief Justice Shepard February 14, 1910 (R., 191-196, 34 Appeals D. C., 284-293).

### **Opinion of Court of Appeals.**

The Court of Appeals differed in its opinion from that of Mr. Justice Barnard, both in respect to the conditions under which the contract of March 28 was executed and as to the scope of that instrument as originally executed, saying on the latter point that:

"The contract of March 28, 1906, seems broad enough in its term to apply to fees that might be received by Gordon under direct appropriation or otherwise, on account of his Indian contract, and would, we think, warrant a recovery by Robertson, if it were not for the subsequent contract and proceeding."

The Court of Appeals likewise ignores the claim based on equitable assignment of March 21, 1906, for \$150.00. It concedes that appellant did not file a formal petition of intervention before the Court of Claims; but, overlooking the testimony of appellant (R., 76), the copy of the letter of appellant to Mr. George H. Patrick (R., 176), quoted above, and not reading the affidavit of appellant (R., 85-87) or the statement of the United States Attorney appearing in the last paragraph, the court overlooked the fact that after writing letters of April 15, 1907, to Butler and Vale and to the Assistant Attorney General, he had, as shown by his testimony and his letter to Mr. Patrick, changed his mind about mailing them; sending them instead to his personal attorney, Mr. Patrick. Upon the erroneous hypothesis that Attorney General Anderson received the affidavit with the original contract attached, the Court of Appeals assumes that they found their way into the record and were considered by the Court of Claims, the court saying:

"As the actual deposition given by Robertson must have been returned to the court by the officer taking the same, it is probable that this deposition was a sworn statement, with exhibits, by Robertson of his services and interest."

The court further ignored the fact that Mr. Patrick, and not Butler and Vale, was counsel for appellant; and, although the finding of the Court of Claims (R., 208) and the testimony of appellee himself (R., 137-8) show that the contract of March 28, 1906, was not before the Court of

Claims, the Court of Appeals erroneously *assumed* that the same was before the Court of Claims, and also that appellant was represented before that court by Butler and Vale, and concludes that he was in legal effect a party to the proceedings; and, without any evidence to support the statement, said that appellant, "*anticipated an award*" inferentially in his own name.

After finding, as above quoted, that the contract of March 28, 1906, was sufficiently broad on which to base a recovery, "if it were not for the subsequent contract and proceedings," the court proceeds:

"When the new agreements of April 3, and April 12, 1906, before stated, were made, two situations were contemplated. The first was that the matter of the award might be considered by the Conference Committee, and made on a *quantum meruit* basis, in which event they were to stand, and abide by any award so made."

The court ignores the undisputed testimony to the effect that the members of the Conference Committee refused to act as arbitrators and that, *ipso facto*, the contract of April 3 became void and, by the terms of the instrument itself, "the right of said parties *shall remain unaffected*," and proceeds:

"Hoping by joining with Nuzum, who claimed under some other contract to obtain an appropriation of the entire sum of \$150,000.00, they entered into the agreement providing for a different distribution, in which Gordon and Robertson were separately provided for."

The court here omits to state that the provision for appellant and appellee was in harmony with the terms of their contract of March 28, 1906, equal, \$9,375.00 each, and disregarding the testimony of appellee himself (R., 134) that upon the execution of this agreement of April 12, 1906, the

relations of appellee and appellant were such as that he, "construed the contract (of March 28 and April 12) as one," the court proceeds:

"These new agreements took the place of all former ones between the parties; one to control in one probable event of congressional action, the other to control in another. The result provided for in the agreement of April 3 occurred, but not exactly as anticipated.

"The *quantum meruit* basis was adopted by Congress, but instead of determining the several amounts by its own action, it referred that determination to the Court of Claims. It is not necessary to decide whether the contract of April 3 embraced any other determination, on the basis of *quantum meruit*, than that expected to be made by Congress direct, and would not apply to its determination by reference to the Court of Claims.

"Whatever view may be taken of this, certainly those who appeared in that court and presented their claims for adjudication and received separate and distinct award therefor, are bound by their action and the judgment rendered thereon. \* \* \*

"As a separate award was made to him (appellant) and to Gordon on the *quantum meruit* basis, we think that his conduct, though lacking in formal pleading, was sufficient to bind him by the judgment rendered, and that he is estopped to contradict that judgment."

The decree (R., 196) of the Court of Appeals having been entered, the cause was promptly brought to this court on appeal (R., 197), the errors assigned in the appellate proceedings (R., 198) being as follows:

## **Assignment of Errors.**

### I.

That it appears that, on the whole record, the decree of the Supreme Court of the District of Columbia of July 15, 1909, dismissing the bill of complaint, dissolving the injunction and entering judgment for costs against said appellant, Robertson, should have been reversed.

### II.

That the court should have found in favor of the appellant, Robertson, and against the appellee Gordon, as prayed in the bill of complaint.

### III.

The court erred in affirming said judgment and decree of the Supreme Court of the District of Columbia, and in imposing costs upon the appellant.

### IV.

The court erred in not finding that the contract in writing between the appellant Robertson and the appellee Gordon, dated March 28, 1906, set forth in the bill of complaint applied to the gross award of attorneys' fees made by the Court of Claims and paid by the Treasurer of the United States into the Supreme Court of the District of Columbia, as awarded to appellant Robertson and the appellee Gordon.

### V.

The court erred in not finding, upon the record, that the appellant, Robertson, and the appellee, Gordon, were to share equally in the moneys awarded either and both of them by the Court of Claims, and impounded in this cause.

after settling with other attorneys under contract, theretofore made by appellee Gordon.

## VI.

In finding that appellant Robertson was estopped by the said decree of the Court of Claims from asserting his said claim against appellee Gordon, sued in this cause.

## VII.

The court erred in not finding that the appellee, Gordon, by his said agreement of March 28, 1906, was estopped to deny the written agreement sued on, as set forth in the bill of complaint and opinion of the court, as the measure of the rights of appellant and appellee under the facts and circumstances of this case.

## VIII.

The court erred in favor of the appellee, Gordon, and against the appellant, Robertson, and in affirming the decree of the Supreme Court of the District of Columbia that the appellee, Gordon, be entitled to the sum decreed to him out of the funds herein.

## IX.

The court erred in holding that said appellant, Robertson, was actually or in legal effect a party to the suit in the Court of Claims in the name of Butler and Vale against the United States of America and the Indians on the Colville Reservation, and estopped or bound by the judgment and decree of said court in said cause.

## X.

The court erred in not finding that the allegations of the bill of complaint were sustained by the entire record, and entitled appellant, Robertson, to the full relief prayed for.

**ARGUMENT.**

The assignments of error to the decree of the Court of Appeals (R., 196), affirming the decree of the Supreme Court of the District of Columbia (R., 187), denying the relief sought by appellant, will be argued under the following propositions:

I. That appellant made out his case in the lower court, substantiating his right to participate equally in the division of the fund of \$16,000, under the contract of March 28, 1906, and to receive from the share of appellee, under equitable assignment of March 21, 1906, the additional sum of \$150; and the decree of the lower court, denying relief, should have been reversed by the Court of Appeals.

II. Appellee's defense of *res adjudicata* is inconsistent with his answer and not sustained by the law or the evidence.

III. That upon the whole record the courts below should have held the appellee estopped to deny the right of appellant to the relief sought.

IV. That the first defense of appellee to the contract of March 28, 1906, to the effect that said contract was predicated wholly upon the condition that the appellant should secure a new contract from the Indians, is contrary to the terms of the written instrument itself, which cannot be attacked by oral testimony under the pleadings and was not sustained by the evidence.

V. That appellee's first defense to the equitable assignment for \$150, dated March 21, 1906, is contrary to the terms of the instrument itself and was not sustained by the evidence.

## I.

*Appellant's Case Made Out.*

In support of the first proposition, it will be contended:

- (A) That appellant's claims are substantiated by written instruments.
- (B) That the terms of the contracts are sufficiently broad to admit of recovery out of the fund in court; and
- (C) That the contract has not been varied or abrogated by any subsequent written instrument.

No question has been raised as to the sufficiency of the averments of the complaint. No demurrer was interposed in the lower court, and the bill undoubtedly sets up a *prima facie* case for the equitable relief sought.

*(A) Claims Substantiated by Written Instruments.*

Both items of claim are based on written contracts, and these contracts are each set out in full in paragraph five of the bill (R., 4), and in paragraph five of the amended answer (R., 39-40) the execution of these several instruments by appellee is admitted; and, as to the one on which an advance of \$150 was made by appellant to appellee, appellee admits the fact of the receipt by him of such advance.

One of these instruments on its face obligated both parties to

"share equally in all monies appropriated by Congress or allowed by the Interior Department which may accrue to said Gordon or said Robertson as attorney fees, growing out of the rendition of services

to the Colville tribe of Indians, whether allowed under the Maish-Gordon contract with said tribes, or on any other theory whatsoever, which said interest is to enure to either party, no matter in whose name such allowance is made."

The other instrument signed by the appellee, after acknowledging receipt of the sum of \$150, provides:

"In case we succeed in collecting such claim, I agree that *out of my share of the profits*, I will repay to said Robertson the said one hundred and fifty (\$150.00) dollars."

The bill avers and the amended answer admits (sixth paragraph, R., 40) that "the claim of the Colville Indians aforesaid was duly prosecuted \* \* \* and that appropriation was made."

The bill also avers and the amended answer also admits that the sum of \$16,000 was allowed to appellant and appellee "as attorneys' fees," \$2,000 in the name of appellant and \$14,000 in the name of appellee.

The appellant refrains from accepting the award in his own name in the satisfaction of his claim as between appellant and appellee, and brings this proceeding against the proper officials of the Government, as well as appellee, by means of which the whole fund of \$16,000 has been paid into the lower court, as a court of equity, with jurisdiction to divide the same between appellant and appellee in harmony with the principles of equity applicable to the case and in accordance with the terms of their two written contracts.

This, we submit, is sufficient foundation in fact and in law for the equitable relief sought, but the courts below have not so held.

In the light of the opinions of the Supreme Court of the District of Columbia and the Court of Appeals, it would seem that both courts ignored the claim for \$150, based

upon the equitable assignment, and that they differed in theory upon the basis on which their respective adverse action was predicated, particularly as to the scope of the main contract. We will proceed with the argument of the untenable theory of the lower court on this proposition.

*(B) Terms of Contract Sufficiently Broad to Admit of Recovery Out of the Fund in Court.*

On the scope of this contract, the Court of Appeals, in its opinion (R., 195) finds:

"The contract of March 28, 1906, seems broad enough in its terms to apply to fees which might be received by Gordon under direct appropriation or otherwise, on account of his Indian contract, and would, we think, warrant a recovery by Robertson, if it were not for the subsequent contracts and proceedings."

On the same point, Mr. Justice Barnard, of the lower court, in his opinion (R., 186), held:

"This contract strictly argued would apply only to moneys *that were appropriated by Congress, or allowed by the Interior Department, to one or both of these parties;* and does not by its terms apply to moneys allowed by the Court of Claims for the actual value of the services of said attorneys."

Thus it will appear that the contract was construed in one way by the lower court and in another way by the Court of Appeals, and that the two courts are diametrically opposed to each other in the interpretation of the agreement.

Independently of the features mentioned in the last clause of the quotation from the opinion of the Court of Appeals, which will be met under another branch of the argument, it will be observed that the lower court acted upon the theory that the act of Congress of June 21, 1906, did not, in effect,

make "*an appropriation*," and that the Court of Appeals is of the opinion that the contract was broad enough to cover the funds in court, whether they were derived by "direct appropriation *or otherwise*."

We submit that the Court of Appeals is correct in its construction and propose to show that the lower court was in error in so interpreting the statute and that the appellee Gordon has admitted a contrary interpretation of the statute as making "*an appropriation*" both by pleading and otherwise; also that an appropriation was actually made, before the institution of this suit, however the original act may be construed.

As heretofore stated, the original Ankeny amendment of March 15, 1906, pending at the date of the Gordon-Robertson agreement of March 28, 1905, made no appropriation of money; it simply settled the Indian claim, that it should some time be paid; set aside the necessary sum for the payment, *to be appropriated* at some subsequent sessions of Congress. This probably would have left the actual allowance to be made by the Department of the Interior, out of "moneys appropriated by Congress," and explains the phrase in the Gordon-Robertson agreement, "or allowed by the Interior Department." No actual payment could have been made inside of a year after the passage of the act of June 21, 1906, had the provision relating to the Colville claim remained as under the original Ankeny amendment, the only official recognition by Congress of the Colville claim up to the date Gordon and Robertson agreed between themselves.

To avoid this delay of one year, in the payment of counsel fees, after that matter had been presented, the proper committee of Congress, added to the Ankeny amendment (ending with the word "dollars" in line 17 of the act of 1906 as it appears on page 5 of the record) not only the provision conferring jurisdiction on the Court of Claims, but the further provision (beginning in line 33 of this item

in the appropriation bill), making an appropriation for the payment of the award, which reads as follows:

"And the Secretary of the Treasury is hereby authorized and directed to pay the sum of money so awarded by said court to the said attorneys (Butler and Vale), upon the rendition of final judgment, out of said sum *herein set apart or appropriated* for the benefit of said Indians," etc.

In the Indian Appropriation Act of March 1, 1907 (34 Stats., 1050), making appropriation for the first installment of payment to the Colville Indians, appears:

"Said sum of three hundred thousand dollars to be paid to or expended for the benefit of said Indians under the direction of the Secretary of the Interior."

Had the settlement with the attorneys been made out of this appropriation, the provision in the Gordon-Robertson agreement of March 28, 1906, relating to "allowed by the Department of the Interior," would have been applicable, but, of course, out of "moneys appropriated by Congress" as well.

In the Indian Appropriation Act of April 30, 1908 (35 Stats., p. 95), passed before the Court of Claims judgment of May 25, 1908, in the Butler and Vale suit, the appropriation is—

"for the second of five installments of three hundred thousand dollars, to be expended for the benefit of said Indians in accordance with the provisions of the said act (of June 21, 1906), setting aside in the Treasury the money in payment for the land ceded,"

and the payment to all the attorneys, the payment of the money now impounded in this suit, has actually been made out of this latter appropriation—appropriated money in every acceptation of that term.

Plaintiff's bill of complaint (par. 6), alleged as to the appropriation of March 1, 1907—

"and said full sum of three hundred thousand dollars has been paid to and received by the said Colville Indians as a first payment of one-fifth the sum recovered by and for them as a result of the successful prosecution of their said claim against the United States of America, as aforesaid."

And as to the appropriation of April 30, 1908, the bill alleges—

"that an appropriation has been made for a further payment from the said trust fund to the said Colville Indians, by the act of Congress, public 104 (H. R. 15219), entitled" etc.

The appellee, by his amended answer filed February 23, 1909 (R., 38), long after the order of appointment of receivers and the dismissal of the bill as against the Secretary of the Treasury and other officials, dated November 2, 1908 (R., 20-21), said:

"Six. The defendant admits that the claim of the Colville Indians aforesaid was duly prosecuted in despite of the complainant's failure to obtain said new contract, and that appropriation was made as in and by the acts set out in the 6th paragraph provided."

The plaintiff's said bill set out in full the agreement between Gordon and Robertson of March 28, 1906, the settlement with and payment to the Indians, and the appropriation for the attorney fees of June 21, 1906, also the appropriations for the first and second installments of payment to the Indians of March 1, 1907, and April 30, 1908, so that appellee, in answering, had all the facts before him, and specially called to his attention; and his admissions of

the fact and bearing of the appropriations can relate to nothing else, and bind him and the court.

There is no denial anywhere in the record of the fact of appropriation, nor that it is "appropriated" money in controversy; the bill alleges and the answer admits both unequivocally. There can be no more denial in law that the appropriation has been duly made by Congress, and that the fund now impounded in this court and the subject-matter of this suit, is money duly *appropriated by Congress*, exactly meeting the condition provided for in the Gordon-Robertson agreement of March 28, 1906, as to the division between them.

Considering the language of the statutes, including the act of 1906, the indisputable fact that both the Court of Claims and the Treasury Department have recognized the authority of this statute as fully meeting the requirement of article 1, section 9, paragraph 7, of the Constitution of the United States to the effect that "no money shall be drawn from the Treasury but in consequence of the appropriation made by law," the fact that the matter was properly averred in the bill and not denied, but admitted in the amended answer, it would seem unnecessary to cite authority to rebut the holding of the lower court and sustain the contention of the appellant that an appropriation was made, within the meaning of the contract, for the payment of counsel.

But such authorities are plentiful.

*Brashear vs. Mason*, 6th How., 99, 100-101.

*Reeside vs. Walker*, 11th How., 287, 291.

*Hart vs. U. S.*, 118 U. S., 62, 182 U. S., 244.

"It is a well-known constitutional provision, that no money can be taken or drawn from the Treasury except under an appropriation by Congress. See Constitution, art. 1, par. 9, 1 Stat. at Large, 15."

*Reeside vs. Walker (supra)*.

"*An appropriation* is the setting apart from the public revenue of a certain sum of money for a speci-

fied object, in such a manner that the executive officers of the Government are authorized to use that money for that object, and no other."

*State vs. Moore*, 50 Neb., 88, and cases cited in Words and Phrases, vol. I, p. 71.

"Appropriation means to assign, to set apart to a particular use."

*Fellows vs. Hamilton Comf.*, 97 Fed. Rep., 823.

"Appropriation is defined by Webster to be the act of setting apart to a particular use. The expression in the Constitution of the State 'appropriated by law,' means the act of the Legislature setting apart or assigning to a particular use a certain sum of money to be used in the payment of the debt due from the State to its creditors."

"The people have said in their sovereign capacity that no money shall be paid out of the Treasury until their representatives by solemn enactment have assigned and set apart the public revenue of the State for specific purposes. Nothing more is requisite to the legislative appropriation of money than a designation of the amount, and the fund out of which it shall be paid. It is not essential to its validity that funds to meet the same should be at the time in the Treasury."

"The Constitution provides that no money shall be drawn from the Treasury, but in consequence of appropriations made in law means only that no money shall be drawn except in pursuance of law."

*People vs. Brooks*, 16 Cal., 11; also

*Prole vs. Hunn*, 80 Cal., 220.

"A direction to the proper official to pay money out of the Treasury on a given claim or class of claims or for a given object may by implication be held an appropriation of a sufficient amount to make the required payments."

*Henderson vs. Indiana State Bd. of Ag.*, 129 Ind., 92; 28 N. E., 127.

It is a well-established principle of law that, in construing a contract, the court must read into it as a part thereof the law of the jurisdiction in which it was made or to be performed.

Coughlan *vs.* S. C. R. R. Co., 142 U. S., 101, 107.

McCullough *vs.* Virginia, 172 U. S., 102, 112.

There can be no doubt that the action of Congress constituted an appropriation by Congress within the meaning of the contract, and that the \$16,000 in the hands of the court for distribution comes within the clauses in said contract, "which may accrue to said Gordon or said Robertson as attorneys' fees, growing out of the rendition of services to the \* \* \* Indians, whether allowed under the Maish-Gordon contract \* \* \*, or on any theory whatsoever \* \* \* *no matter in whose name such allowance is made.*"

On this point, we submit that the construction given the contract by the Court of Appeals was correct and that given by the lower court was erroneous.

It is also contended that the course pursued by appellant under said contract was in harmony with the provision of the agreement—

"Both parties hereto to mutually labor to secure such allowance."

This brings us to the consideration of the serious error of the Court of Appeals involved in the qualifying words to the paragraph quoted from its opinion above, to the effect that the admitted right of appellant to recovery was affected by "subsequent contracts."

## II.

(C) *Contract Not Varied or Abrogated by "Subsequent Contracts."*

This point is involved in the unique position taken by the Court of Appeals in its opinion in respect to the effect upon the pre-existing contractual relations of appellant and appellee of the papers writing signed by them with other counsel, dated respectively April 3 and April 12, 1906, both of which are set out in full above in the statement of the case.

After quoting the contract of March 28, 1906 (R., 191-2), the Conference Committee's stipulation of April 3, 1906 (R., 193), the Raleigh agreement of April 12, 1906 (R., 193), and stating that the contract of March 28, 1906, was sufficiently broad on which to "warrant a recovery by Robertson," but for "subsequent contracts and proceedings," the Court of Appeals proceeds (R., 195-196) to find that:

*"These new agreements took the place of all former ones between the parties; one to control in one probable event of congressional action, the other to control in another. The result provided for in the agreement of April 3d occurred, but not exactly as anticipated.*

*"The quantum meruit basis was adopted by Congress, but instead of determining the several amounts by its own action, it referred that determination to the Court of Claims.*

*"Whatever view may be taken of this, certainly those who appeared in that court and presented their claims for adjudication and received separate and distinct awards therefor, are bound by their actions and the judgment rendered thereon."* (Italics supplied.)

The errors involved in the last-quoted paragraph will be treated under a separate branch of this argument. The

point to which the attention of the court is now particularly called, is the positive finding that

"These new agreements took the place of all former ones between the parties."

It will be observed from the statement of the case that the answer of appellee asserts no such theory of defense; that the lower court made no such finding, and that it is a theory originating entirely with the Court of Appeals, and, therefore, appellant has never before had an opportunity to point out the fallacies of this erroneous deduction.

On this point we propose to show:

(a) That the negotiations between appellant and appellee with other counsel, resulting in said agreements, were entirely consistent with the terms of their contract of March 28, 1906, and their plans formed previous to the execution of that contract.

(b) That the contingency mentioned in the stipulation of April 3 never happened, and, according to its own terms, the rights of the parties "*remained unaffected*" thereby.

(c) That the Raleigh agreement was entirely consistent with that of March 28, 1906.

(d) That the construction of the Court of Appeals is illogical.

*(a) Negotiations Consistent with Contract March 28, 1906.*

The correspondence, presented in the main statement of the case anterior to the execution of this contract, shows that the relations were strained between appellee and Butler and his associates Vale and Henderson, if not May, who was apparently inactive. Also that Nuzum and his associates, setting up a hostile claim, were to be reckoned with

in obtaining any practical results. The postscript to the letter of appellant to appellee of January 8, 1906 (R., 170), and the letter of appellant to appellee of March 10, 1906 (R., 173, 174), showed that one of the purposes of the trip to Washington was to bring about, if possible, some amicable arrangement with antagonistic counsel, including Nuzum, and the telegram from appellee to appellant of March 20, 1906 (R., 87), directing appellant to "notify Nuzum" of his arrangements, shows that appellee was in accord with this plan. The undisputed fact is that the first thing appellant and appellee did on reaching Washington was to make the contract of March 28, 1906, in the broad terms which appear therefrom, and could not have been broader in rendering the same entirely consistent with the negotiations, stipulations, and agreements which followed.

We submit that there is at least one provision in the contract which specifically provided for just such negotiations, namely, "both parties hereto to mutually labor to secure such allowance."

There is not one scintilla of written evidence in the record to indicate any change in this contract, increasing or diminishing the obligations and duties of either party thereunder.

As has been specifically pointed out in the main statement of the case, the consideration for this contract passing from appellant to appellee especially was not confined to the value of the services of appellant to the Indians. It included expenses he had incurred or paid in the West and the several years' services in the interest of appellee personally, as well as appellant's services in the interests of the Indians; and by this contract appellant agreed out of his share "to compensate R. D. Gwydir by a reasonable compensation."

It was entirely consistent with their contract therefore that appellant and appellee should negotiate and enter into stipulations with other counsel in harmony with their com-

mon purpose, without disturbing their individual contractual relations.

(b) *Conference Committee Stipulation April 3.*

Before discussing this agreement it is well to get the then legislative status clearly in mind. The Indian Appropriation bill passed the House and was, on March 9, 1906, referred in the Senate to its Committee on Indian Affairs. Senator Ankeny had, on March 15, 1906, submitted a proposed amendment to that bill (Cong. Rec., 3838), making provision for the Indians, agreeably to recommendations of the Secretary of the Interior, but no provision whatsoever had been introduced to cover counsel fees. The language of said proposed amendment constitutes the first sixteen lines and the word "dollars," as thereafter embodied in the statute as printed on page 5 of the record. No provision having been made in the House, it was a foregone conclusion that any item which should be passed by the Senate should go to the Conference Committee of the two Houses.

It is a well-known fact of congressional legislative procedure that the presiding officer of the House and of the Senate appoint on Conference Committees the two ranking members of the majority party and the ranking member of the minority party of the respective Houses from among the members of the committee having a bill in charge. Of those who signed this agreement or stipulation, Mr. Butler had been a member of the Senate, appellee was the son of a former member of the Senate, appellant was a brother of a member of the House, and all proceeded intelligently with no small degree of familiarity with the legislative procedure.

Of those claiming under the Maish-Gordon contract, appellant and appellee and Butler and Vale were present in Washington and active, and this stipulation was signed by them.

From the terms of the instrument itself, without regard to the oral testimony, but considered in the light of the relations existing between appellant and appellee, as evidenced by their contract and correspondence, this agreement or stipulation of April 3 constituted a plan of having the amount of the award *for services to the Indians, not services or other considerations passing between appellant and appellee* or Butler and his partner Vale, fixed and determined on a *quantum meruit* basis. According to the terms of this stipulation the arbitrators were to be not the judges composing the Court of Claims, but the members composing or to compose the Conference Committee of the House and the Senate, the personnel of which was then as well known as if an actual designation had been made.

And this agreement or stipulation provided by its own terms that

"in case no award shall be made (by the Conference Committee of the Senate and the House of Representatives on a *quantum meruit* basis) *the rights of said parties shall remain unaffected.*" (Italics and parentheses supplied.)

It might reasonably be suggested that as between appellant and appellee there was nothing in this stipulation which was inconsistent with their existing contract of March 28, 1906, the express understanding therein being that their respective rights to division under that contract should stand, no matter in whose name the award for services to the Indians should be made or on whatever theory; but it becomes unnecessary to discuss this phase of the matter because the stipulation or agreement of April 3 specifically provided that "*the rights of said parties shall remain unaffected*" thereby in the event no award was made by the Conference Committee thereunder.

It is not necessary to refer to the undisputed oral testimony in this case to show that the plan was abandoned and the agreement became void and all parties restored to their

previous status, because the court has before it the action taken by Congress, and there is nothing in the statute which in any way warrants the suggestion that the Conference Committee ever in fact made such an arbitration. No party to this cause makes such contention by pleading or otherwise, and therefore this court must conclude that so far as the stipulation of April 3, 1906, is concerned it has and can have no effect whatsoever upon the written contract of March 28, 1906, between appellant and appellee, and the suggestion to the contrary on the part of the Court of Appeals is clearly untenable.

The stipulation of April 3, 1906, having been entirely conditional and the condition having failed, the rights of the parties thereto "*remain unaffected*," according to its own terms, and so far as the controversy here presented is concerned the relations of appellant and appellee are the same as if it never existed.

(c) *Agreements of April 12 and March 28, 1906, Consistent.*

The Raleigh Hotel agreement reads in full as follows:

"WASHINGTON, D. C., April 12, 1906,

"This agreement made and entered into between Marion Butler, on his own behalf and on behalf of associate counsel (party of the first part), R. W. Nuzum, on his own behalf and on behalf of his associate (party of the second part), and Hugh Gordon and F. C. Robertson (parties of the third part): witnesseth:

"That whereas, each of *said parties* mentioned herein have rendered services as attorneys for the Colville Indians and claim the right to participate in *any* appropriation made to pay said attorneys' fees;

"Now, therefore, provided the sum of one hundred and fifty thousand (\$150,000) dollars is allowed for the payment of attorneys representing said tribe of Indians then of the said sum eighteen thousand

seven hundred and fifty (\$18,750) dollars is to be paid to said R. W. Nuzum for himself and associates and nine thousand three hundred and seventy-five (\$9,375) dollars to Hugh Gordon and nine thousand three hundred and seventy-five (\$9,375) dollars to F. C. Robertson; the remainder of said sum to be distributed by said Marion Butler as he elects. *Should the appropriation be less, then this agreement is to be the basis of the distribution, sharing pro rata in such diminished sum, as the percentage is thereby diminished.*

"In witness whereof we have hereunto set our hands and seals at the city of Washington the day and date above written.

"R. W. NUZUM. [SEAL.]  
 "HUGH H. GORDON. [SEAL.]  
 "F. C. ROBERTSON. [SEAL.]  
 "MARION BUTLER. [SEAL.]"

(Italics and parentheses supplied.)

It will be observed from an inspection of the instrument itself

First. That while the parties to the agreement were not designated therein as parties of the first, second, and third parts, it appears that they constituted three groups of interests, appellant and appellee *being practically parties of the third part.*

Second. That, in direct accord with their agreement of March 28, 1906, the same amount was to be apportioned to each of them, namely,  $6\frac{1}{4}$  per cent of the whole amount to be "allowed," the balance to be apportioned  $12\frac{1}{2}$  per cent to Nuzum and 75 per cent to Butler.

Third. That the reference to the appropriation was general, consisting of a recitation that parties "claim the right to participate in *any* appropriation."

Fourth. That there was nothing in the agreement specifying the tribunal, whether Congress or the Court of Claims, by which the total compensation for services of counsel against the Indians was to be "*allowed*."

Fifth. That there was nothing in the agreement which confined its operations to an allowance of \$150,000, as inferentially might be assumed from the language of the Court of Appeals, but the instrument expressly provided for a *proportionate deduction* in the event of an allowance of less than \$150,000.

Sixth. The instrument is not inconsistent with an award against the Indians being computed on a *quantum meruit* basis, but is inconsistent with that plan being used in the ultimate division of the fund among counsel.

Seventh. The instrument is under seal.

Eighth. The instrument contains nothing which provides for the compensation of Gwydir or which relieves appellant from his obligation to appellee "to compensate" him "by a reasonable compensation" out of his share.

Ninth. There is nothing in the agreement, express or implied, which relieves appellant and appellee of their mutual obligations to each other, as set forth in their agreement of March 28, 1906.

Tenth. *There is no word or phrase in the agreement which is inconsistent with the terms of the agreement of March 28, 1906, between appellant and appellee.*

For the convenience of the court this agreement is here again set out, as follows:

"MARCH 28, 1906.

"This agreement made between F. C. Robertson and Hugh H. Gordon, witnesseth, that they shall share equally in all monies appropriated by Congress, or allowed by the Interior Department, which may accrue to said Gordon or said Robertson *as attorney fees, growing out of the rendition of services to the Colville tribe of Indians, whether allowed under the Maish-Gordon contract with said tribe, or on any other theory whatsoever,* which said interest is *to inure to either party, no matter in whose name such allowance is made.* Both parties hereto to mutually labor to secure such allowance. Out of said Robertson's share he agrees to compensate R. D. Gwydir by a reasonable compensation. The fees to be divided between said Robertson and said Gordon as herein provided shall be the net sum accruing to said Gordon, after settling with other attorneys under contract heretofore made by said Gordon.

"F. C. ROBERTSON.

"HUGH H. GORDON."

Compare as we may item by item and element by element of these two contracts and no inconsistency whatsoever can be found by which to contend that the Raleigh agreement abrogated or took the place of that of March 28, 1906, as between appellant and appellee.

Being unable to see any inconsistency in the two agreements, counsel believes that the foregoing argument is sufficient to meet and overcome the erroneous contention of the Court of Appeals without resorting to oral testimony in the premises. The court, without apparently noting that appellant and appellee, agreeably to their previous contract, were to share equally in the distribution under the Raleigh agreement, alone points out that in the latter agreement "Gordon and Robertson were *separately provided for.*" We submit that the previous contract contemplated that appellant might or might not receive allowances in their respective names or otherwise, but contains the specific provision that they should share equally, "*no matter in whose name such allowance is made.*"

*(d) Conclusion Illogical and Inequitable.*

Against the court's position, aside from the contemporaneous construction of the parties and the testimony of both of them to the contrary, the logic of the situation was diametrically opposed to this construction.

It is not contended that the Raleigh agreement as between appellant and appellee (*if between them at all*) was based upon any less consideration than that of March 28, 1906, which included the value of the services of Gwydir, at least during the period of the intercourse by Gwydir with appellant. In the absence of some affirmative or clearly inconsistent language in the Raleigh agreement, it would certainly seem a strained construction, ignoring as it would matters fundamental and considerations inherent in an existing agreement, for appellant's obligation to appellee to compensate Gwydir "by a reasonable compensation" to be practically construed out of existence.

A like injustice would have been done appellee by such construction in the matter of the claim of the administrator of Maish, *an attorney*. Is it reasonable to suppose, or is there any language in the Raleigh agreement to indicate, that appellant was thereby being relieved of his obligation under the previous contract with appellee under which only "the *net* sum accruing to said Gordon, after settling with other attorneys under contracts heretofore made by said Gordon," was to be divided between them.

Yet there is nothing in the Raleigh agreement *alone* which places these two important obligations upon appellant, and we must go to the contract of March 28, 1906, for such provision; otherwise appellant would have received under the Raleigh agreement one-half of the *gross* amount received by the two, freed from any burden whatsoever.

It seemed manifestly proper, therefore, that this suit should have been predicated, except as to the equitable assignment for \$150, upon the basic contract between the

parties; and this Raleigh agreement has only come into the record as evidence tending to contradict appellee in his effort, by oral testimony, to vary the terms of the basic written instrument.

How the Court of Appeals could take the position that the basic agreement is abrogated by the Raleigh agreement, and close its eyes to the logical results of such position, denying any or all relief even under the Raleigh agreement, counsel is unable to conjecture, except that the court went off on another point which is equally untenable and which will be hereinafter discussed. It is deemed not inappropriate in this connection, however, to call attention to the fact that there is nothing in the action of Congress or the decision of the Court of Claims which relieves the appellee of any obligation he may have assumed to appellant by the Raleigh agreement, if anything new as between appellant and appellee was involved, and which is denied.

As construed by the Court of Claims the jurisdictional statute contemplated privity of contract between attorneys and the Indians. It found no such privity of contract in the instance of Nuzum and his associates, and their services to the Indians were not taken into account in arriving at the sum total of the value of the services of all of the counsel to the Indians. The privity of contract of other counsel was traced by the court principally through appellee to the Maish-Gordon contract.

The Court of Claims further held that all of the parties interested were not represented in the Raleigh agreement, and found that the services of Maish were worth to the Indians the sum of \$6,000.

The court further found that the Raleigh agreement did not conform in all particulars to the character of agreement in the mind of Congress when it passed the statute, including a lack of authority to Butler and Vale to receive the funds, certainly of counsel other than themselves

and their own associates, and even made awards to Henderson and May, who though associates of Butler, were not parties to the agreement.

Butler and his associates, having accepted their awards, are in no position to enforce any claims they might have had under the Raleigh agreement.

But if, as the Court of Appeals suggests, the Raleigh agreement operated so as to supersede and take the place of the contract of March 28, 1906, as between appellant and appellee, can a court of equity, on its own motion, take such position, without considering the rights of appellant as against appellee, even under the Raleigh agreement?

There is certainly nothing in the proceedings before the Court of Claims or the conduct of appellant to prevent affirmative relief being accorded him in this cause.

We submit that the appellant has made out his case, as set up in the bill of complaint, that the lower court is in error and the upper court correct as to the scope of the contract of March 28, 1906, that the holding of the upper court to the effect that subsequent stipulations or agreements abrogated or took the place of said basic agreement, is untenable, and that the Court of Appeals erred in not sustaining appellant's prayer for relief and reversing the decree of the Supreme Court of the District of Columbia denying the same.

*Res Adjudicata.*

That said defense to both instruments is inconsistent with the exhibit to the answer of appellee and not sustained by the law or the evidence.

This proposition will be discussed under the following heads:

(A) The Court of Claims was without jurisdiction to determine any controversy between the appellant and the appellee based upon their contracts of March 21 and 26, 1906.

(B) Said contracts were not involved in any issue before that court.

(C) Said contracts did not form the "subject-matter" of the proceedings before the Court of Claims, and said proceedings were not had "for the same purpose" as that involved in this cause.

(D) Appellant was not a party to the proceedings before the Court of Claims.

*Statement.*

We have shown that the case of appellant, predicated upon written instruments, was duly set up by the pleadings, their execution admitted by the answer and proven by the evidence. Also that the same were not modified or abrogated by the subsequent stipulation or agreements of counsel of April 3 and 12, 1906. It is proposed under this heading to show that the right of appellant to recovery, otherwise conceded in the opinion of the Court of Appeals (R., 195), is not prevented by "the subsequent \* \* \* proceedings" any more than by the "subsequent contracts" last above discussed.

This is the only point which, apparently, had any bearing upon the decree of the Court of Appeals on which there is the semblance of a pleading in this cause on the part of appellee on which to support the adverse conclusion, as indicated in the opinion of the Court of Appeals. Therefore, at the expense of some repetition, the underlying propositions involved will be presented.

Among the defenses of the appellee to the cause of appellant, as made out by the averments of the bill, there was set up in appellee's amended answer (par. 8, R., 41), the following defense of *res adjudicata*:

"And in response to the plaintiff's allegation that the 'Court of Claims made no judgment, decree or division between the parties in respect to any agreements or contracts among themselves' this defendant avers that the complainant, in the said Court of Claims, appeared and submitted his claim to one-half of the compensation to be awarded to this defendant, and the defendant is advised and believes and upon such information and belief avers that the complainant was in all legal respects a party to said cause in said Court of Claims; that he submitted to, and the said court had jurisdiction to hear and determine his rights, and as the defendant expects to prove at the trial of this cause, the complainant elected to stand, as against this defendant, as well as the Colville Indians and the United States, upon the reasonable value of the services he claimed and claims to have rendered in the premises, and this defendant claims the benefit of such election and the estoppel resulting therefrom and therefore avers the title and claim of the said complainant here presented is a thing adjudicated by the Court of Claims against the said complainant and is not a subject for inquiry by this court."

As more particularly pointed out in the main statement of the cause, the appellee exhibited to his answer the findings of fact, conclusions of law, and opinion of the Court of Claims (R., 202-222), which rebut the averments of this defense in a number of particulars set forth in the main statement, including findings by that court that the cause was one between Butler and Vale as against the United States and the Indians; that it "*does not appear*" that said Robertson entered into any contract with any one as to his compensation for services (R., 208); that the appellant became interested in the matter through the solicitation of appellee in 1903 or 1904, and "paid the expense" of having appellee come to Washington, without any finding as to the amount of such expense or deduction from the award in the name of appellee therefor, and the

Court of Claims expressly found that its jurisdiction was such as to confine that court to a consideration of the value of the services of counsel *to the Indians*, and it dismissed the equitable assignments of appellee, as presented on intervening petition by Gwydir, Edwards, and Hall, on the ground that the Court of Claims had no jurisdiction to consider matters based upon contractual relations between appellee and those holding equitable assignments from him.

There was an utter failure on the part of appellee to substantiate, by proof, averments essential to sustain the defense of *res adjudicata*. On the contrary, admissions appear in appellee's own testimony and otherwise, namely:

1. That appellant did not personally appear in the cause pending before the Court of Claims (R., 138).
2. That appellant did not appear in said cause by attorney (R., 138).
3. That appellant did not file an intervening petition in the said cause (R., 138).
4. That the appellant did not present to and there was not before the Court of Claims said agreement of March 28, 1906 (R., 138).
5. That instead of the appellant electing to stand upon the reasonable value of his services to the Indians, etc., as averred by appellee, appellee admits (R., 138-139) that he was in error in assuming that appellant had drawn from the Treasury the amount awarded to him by the Court of Claims; and the conduct of appellant in refusing to accept this award and in instituting these proceedings, by which the combined award to appellant and appellee has been brought into court, is apparent upon the record and cannot be denied.

6. Appellee further admitted that he did not advise appellant of his purpose to intervene or serve him with a copy of his petition of intervention (R., 138).

7. The petition of intervention of appellee (R., 226-228) shows that no issue was presented to the court as between appellant and appellee, and that appellant was not made a party thereto; on the contrary, by paragraph 8 (R., 228) thereof, appellee sets up as his purpose to recognize and carry out all "subcontracts entered into by your petitioner subsequent to Maish's death \*.\*.\* faithfully \* \* \*" according to the terms and letter thereof."

8. Appellee further admits (R., 133) that he contended before the Court of Claims for the turning over to him, appellee, of the full amount of the award against the Indians as the surviving contractor under the Maish-Gordon contract with the Indians.

9. Appellee further admits that it was his policy in the intervening proceeding, instituted by him before the Court of Claims, to avoid the trial before that court of controversies with his subcontractors (R., 133).

10. Appellee admits that by brief, further urged by oral argument, before the Court of Claims, he opposed an award being made by the Court of Claims in the matter of the intervening petition of Gwydir, Edwards, and Hall on grounds among which was the point that the Court of Claims was confined in its jurisdiction to services rendered by "attorneys" to the Indians (R., 140).

11. Appellee in his testimony admits (R., 130) having written the letters to Gwydir, dated November 18, 1907 (R., 179), and December 19, 1907 (R., 181), which show his purpose before the Court of Claims to avoid any adjudication of claims against him and of his earnest desire to con-

ceal this fact from appellant, as more particularly set forth in the general statement of the case, quoting from the letters themselves.

12. Appellee admits (R., 139) that he knows of no act of appellant "inimical or hostile to the allowance of compensation" to him except appellant's assertion of this claim.

Under the stipulations at the trial (R., 101) and on appeal (R., 188-189) the record of the case before the Court of Claims was to be treated as evidence and subject to reference on appeal; and, by stipulation (R., 240), the pertinent pleadings are before this court (R., 222-239).

#### *Argument.*

This court has frequently referred to with approval the succinct statement of the law bearing upon *res adjudicata* and equitable estoppel as announced in the case of *Aspden vs. Nixon*, 4th How., 467, 497-8, as follows:

"that a judgment or decree set up as a bar by plea, or relied on as evidence by way of estoppel, to be conclusive, must have been made, 1, by a *court of competent jurisdiction* upon the same subject-matter; 2, between the same parties; 3, for the same purpose."

#### A.

*The Court of Claims was without jurisdiction to determine any controversy between the appellant and appellee based upon their contracts of March 21, and March 26, 1906.*

The only provision of the organic law under which the Court of Claims was established, as a court of limited jurisdiction, at all pertinent to the controversy before it is found in section 1059 of the United States Revised Statutes, and reads as follows:

"The Court of Claims shall have jurisdiction to hear and determine the following matters:

"First. All claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, expressed or implied, *with the Government of the United States* and all claims which may be referred to it by either House of Congress."

Nowhere in chapter 21 of the Revised Statutes of the United States, entitled "the Court of Claims," is there any jurisdiction given by Congress to that court to determine controversies between individuals either as a court of equity or as a court of law; but the whole theory of the organic statute contemplates that the Court of Claims was established by Congress as and is a court of limited jurisdiction to hear and determine controversies between individuals or a corporation and the Government of the United States or its wards, and the jurisdictional statute, under which the proceedings before the Court of Claims were instituted, was framed in consonance with the limited character of the jurisdiction of that court. Said statute reads as follows:

"Jurisdiction is hereby conferred upon the Court of Claims to hear, determine and render final judgment *in the name of Butler and Vale* (Marion Butler and Josiah M. Vale), attorneys and counselors at law, of the city of Washington, District of Columbia, for the amount of compensation which shall be paid to the attorneys who have performed services as counsel on behalf of said Indians in the prosecution of the claim of said Indians for payment for said land, and in determining the amount of compensation for such services the court may consider all contracts or agreements heretofore entered into *by said Indians with attorneys* who have represented them in the prosecution of said claim, and also *all services rendered by said attorneys for said Indians* in the matter of said claim. Petition hereunder shall be filed in said court by the said attorneys (Butler and Vale), within thirty days from the passage of this act, and

the Attorney-General shall appear on behalf of the defendants, and said cause shall be given preference for immediate hearing in said court, and the Secretary of the Treasury is hereby authorized and directed to pay the sum of money so awarded by said court *to said attorneys (Butler and Vale)*, upon the rendition of final judgment, out of the said sum *herein set apart or appropriated* for the benefit of said Indians, and payment of said judgment shall be in full compensation *to all attorneys* who have rendered services to said Indians in the matter of their said claim, the same to be *apportioned* among said attorneys by said Butler and Vale *as agreed among themselves:*

*Provided,* That before any money is paid to any attorney having an agreement with Butler and Vale as to the distribution of said fees each of the same shall execute and deliver to the Secretary of the Interior a satisfaction and discharge of all claims and demands for services rendered said Indians in the matter of their said claim." (34 Stats., 377-378.) (Italics supplied.)

The theory of this statute was clearly such that whatever issue should be raised thereunder should be between Butler and Vale, on the one side, as against the United States (as trustee for the Indians) and the Indians on the other side; and this statute did not so enlarge the powers and jurisdiction of the Court of Claims as to give it authority, as an equity court, to wind up the limited copartnership existing between appellant and appellee under their contract of March 28, 1906, or to otherwise hear and determine any issues between appellant and appellee bearing upon their contractual relations in respect to the division among themselves of the amount awarded them, either severally or collectively.

It is true that the Court of Claims, in a side issue raised between Butler and Vale and certain interveners, including appellee Gordon, but not including appellant, reached the conclusion, as stated in the opinion of the court, that there

existed no such contract as was within the mind of Congress when it authorized the collection by Butler and Vale of the total sum which the court should find had been earned by all of the attorneys as a result of the proceedings as between Butler and Vale and the Indians, and that the court, in its opinion, asserted the power to and, in its final decree, actually apportioned the amount of the total award among various counsel in accordance with its conclusion as to the comparative value of the services rendered by various counsel *to the Indians themselves*; but the court nowhere determined or undertook to determine the question involved in this case, namely, how shall the fund awarded "*in the name*" of appellant and "*in the name*" of appellee be distributed between them or disposed of under their contracts of March 21 and 28, 1906? It is not contended by either party, nor can such an idea be asserted in the light of the findings of fact, conclusions of law, and opinion of the court, that the amount awarded by the Court of Claims in the name of appellant was affected by any element whatsoever except the value of the services of appellant to the Indians, independently of any services or expenditures he supplied on behalf of appellee. The same is true in respect to the theory of the award in the name of appellee, and it cannot be contended that any deduction whatsoever was made from the amount of the value of appellee's services to the Indians on account of the advances, expenditures, or services of appellant to appellee, and there is absolutely no finding of fact by the Court of Claims on which to predicate any such deduction. Therefore it is clear that the Court of Claims did not undertake to, or construe the jurisdictional statute to be broad enough to, permit it to adjudicate the comparative rights of appellant and appellee under their contracts of March 21 and 28, 1906. Neither did the court undertake in its decision to so construe the jurisdictional statute as to deprive counsel of the right to litigate among themselves in respect to the contractual

obligations one to the other. It is clear on the face of the statute that Congress had no such intention. Quite the contrary. And we submit that the Court of Claims had no jurisdiction, either under the organic statute, defining its jurisdiction, or under the special statute, to sit as an equity court, hear and determine such a controversy between appellant and appellee.

Even if the Court of Claims had undertaken to determine the comparative right of appellant and appellee, as between themselves, which it did not do, it is contended that any such action would have been and should be treated by this court as a nullity, as beyond the power and jurisdiction of that court.

In the case of *Hickey et al. vs. Stewart et al.*, 3 Howard, 750, 762, this court referred to, with approval, its former decision, as follows:

"In the case of *Elliott and others vs. Pearsol and others*, 1 Peters, 340, it was held by this court, that 'where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decisions be correct or otherwise, its judgment, until reversed, is regarded as binding on every other court. *But if it acts without authority, its judgments and orders are regarded as nullities. They are not voidable but simply void, and form no bar to a recovery sought, even prior to a reversal, in opposition to them.* They constitute no justification, and all persons concerned in executing such judgments or sentences are considered, in law, trespassers. This distinction runs through all the cases on the subject, and it proves, *that the jurisdiction of any court exercising authority over a subject, may be inquired into in every other court where the proceedings of the former are relied on, and brought before the latter by a party claiming the benefit of such proceedings.*' (Italics supplied.)

## B.

*The Court of Claims could not determine any controversy between the appellant and the appellee based upon said contracts because the same were not involved in any issue before that court.*

In the case of Reynolds *vs.* Stockton, 140 U. S., 254, in equity, this court said:

"Whatever may be the rule where substantial amendments to the complaint are permitted and made, and the defendant responds thereto, or where it appears that he takes actual part in the litigation of the matters determined, the rule is universal that, where he appears and responds only to the complaint as filed, and no amendment is made thereto, the judgment is conclusive only so far as it determines matters which by the pleadings are put in issue."

After citing the case of Murdy *vs.* Vail, 34 N. J. Law, 418, this court proceeds to quote with approval therefrom as follows:

"The inquiry is, had the court jurisdiction to the extent claimed? Jurisdiction may be defined to be the right to adjudicate concerning the subject-matter in the given case. To constitute this there are three essentials: First, that the court must have cognizance of the class of cases to which the one to be adjudged belongs; second, the proper parties must be present; and, third, the point decided must be, in substance and effect, within the issue. \* \* \* It is impossible to concede that because A and B are parties to a suit that a court can decide any matter in which they are interested, whether such matter be involved in the pending litigation or not. Persons, by becoming suitors, do not place themselves for all purposes under the control of the court, and it is only over these particular interests which they choose to draw in question that a power of judicial decision arises."

And again: "A judgment upon a matter outside of the issue must of necessity be altogether arbitrary and unjust, as it concludes a point upon which the parties have not been heard. And it is upon this very ground that the parties have been heard, or have had the opportunity of a hearing, that the law gives so conclusive an effect to matters adjudicated. And this is the principal reason why judgments become estoppels. But records or judgments are not estoppels with reference to every matter contained in them. They have such efficacy only with respect to the substance of the controversy and its essential concomitants. Thus, Lord Coke, treating of this doctrine, says: 'A matter alleged that is neither traversable nor material shall not estop.' Co. Lit., 352*b*. And in a note to the Duchess of Kingstone's case, 2 Smith Lead. Cas., 435, Baron Ciruyn is vouched for the proposition that judgments 'are conclusive as to nothing which might not have been in question or were not material.' For the same doctrine that in order to make a decision conclusive not only the proper parties must be present, but that the court must act upon 'the property according to the rights that appear' upon the record, I refer to the authority of Lord Ridisdale, Giffard *vs.* Hort, 1 Schouler and L., 408; see also, Gose *vs.* Stockpoole, 1 Dow., 30; Colelough *vs.* Sterum, 3 Bligh, 186." Reference is made in the opinion to the case of Covirthe *vs.* Griffing, 21 Barb., 9, in respect to which the court said: 'Commissioners in partition, in their distribution, embraced land other than that contained in the petition, and the court confirmed their report, and it was held that such judgment was a nullity, as the jurisdiction was confined to the subject-matter set forth and described in the petition. In this case the court had jurisdiction in cases of partition, and the decision was upon the ground that the decree was void, as it was aside from the issue which the proceedings presented.'"

This court, speaking through Mr. Justice Brewer, proceeded:

"This case is very much in point. We regard the views suggested in the quotation from the opinion as correct and as properly indicating the limits in respect to which the conclusiveness of a judgment may be invoked in a subsequent suit *inter partes*."

After citing with approval certain other cases, including that of *Packet Co. vs. Sickles (supra)*, this court says:

"But without multiplying authorities, the proposition suggested by those referred to, and in which we affirm, is that, in order to give a judgment, rendered by *even a court of general jurisdiction*, the merit and finality of an adjudication between the parties, it must, with the limitations heretofore stated, be responsive to the issues tendered by the pleadings. In other words, that when a complaint tenders one cause of action, and in that suit service on, or appearance of, the defendant is made, a subsequent judgment therein, rendered in the absence of the defendant, upon another and different cause of action than that stated in the complaint, is without binding force within the courts of the same State, and, of course, \* \* \* has no better standing in the courts of another State."

We submit, therefore, that independently of the question of the jurisdiction of the Court of Claims to determine such a controversy when properly presented and independently of the question as to whether or not the appellant might be treated as a party to the proceedings as against the Indians and the United States, the utter lack of any issue being raised between the appellant and the appellee in respect to the contracts in question, or either of them, no judgment could have been rendered in the Court of Claims which could be pleaded in bar to the complaint based thereon involved in this cause; and none was rendered.

## C.

*The contracts in controversy did not form the "subject-matter" of the proceeding before the Court of Claims and said proceeding was not had, "for the same purpose" as that involved in this cause.*

As has been seen the proceeding brought in the Court of Claims was not instituted for the purpose of winding up copartnerships between counsel, or determining the validity and effect of contracts existing between them in respect to the ultimate distribution of the awards, as among themselves, under any such valid contract; but it was brought against the Indians and their guardians for the determination of the question of the amount of the value of the services of all counsel to them, *the Indians*, and the only pertinency of the contractual relations between counsel to the cause, as presented, was purely collateral to the issues involved in the case at bar, namely, not how much appellee Gordon had contracted to pay them, or any of them, but what, if any, authority these attorneys had through Gordon to represent the Indians, Gordon being the sole surviving attorney with any formal authority to represent said Indians.

It was thus wholly immaterial to the issue before the court as to what appellee Gordon had promised appellant for his services in the premises, including those on behalf of appellee as contradistinguished from those strictly in the interest of the Indians, and for his advances, or what the details of their arrangements were. All that was material to that proceeding was that appellant received his authority to serve the Indians through appellee Gordon. Appellant testified that he received such authority and the Court of Claims in its Finding VIII concludes, from all the evidence before it, that he was so employed, and also, that he de-

frayed the expenses of Gordon to Washington in March, 1905, without determining the amount of those expenses, evidence as to which would have been immaterial to the issues because, under the Maish-Gordon contract with the Indians, the attorneys were to bear their own expenses, and it was no matter of concern to the Indians or to the court, in adjudicating the claim *against the Indians*, what arrangements had been made between appellant and appellee in respect to these expenses.

The court expressly finds, in Finding VIII (R., 208), that no contract between appellant and appellee appeared in the record, said finding, on this point, being in the following language:

*"It does not appear that said Robertson entered into any contract with any one as to compensation for his services."* (Italics supplied.)

Yet in the same finding the court states the material fact that appellant "*became interested in the matter of the claim of said Indians through the solicitation of Hugh H. Gordon under the Maish-Gordon contract in the latter part of 1903 or 1904.*" (Italics supplied.)

In view of the confused idea on this point of the Court of Appeals in its decision sought to be reviewed (34 D. C. Appeals, 539, 544-545), it is deemed proper to say that there was a time, while the case was pending in the Court of Claims, that appellant took counsel as to whether or not it was proper or desirable that he should present to the court the contracts upon which the case at bar are predicated, and that he went to the extent of making an affidavit (R., 85-86), to which was attached said contracts (R., 86-87), and actually *prepared* a letter to the Assistant Attorney General requesting him to permit the same to be introduced as a supplement to his deposition (R., 175), and another letter to Butler and Vale (R., 175); but the fact is, as he testified (R., 75) instead of mailing those letters and enclosures

to the parties addressed, the original papers were sent to his *private attorney, George H. Patrick*, with a letter (R., 176) seeking advice on the subject, and were subsequently returned by said Patrick (R., 76) to appellant, having remained "*in his possession*" in the meantime, and were introduced by him as evidence in this cause *without ever having been filed or presented before the Court of Claims*.

The action of Mr. Patrick, resident counsel for appellant, was manifestly correct in not having intervened on behalf of appellant before the Court of Claims and in not having presented said contracts for the consideration of that court in that cause for the reasons hereinbefore set forth, namely:

First. Because the Court of Claims had no jurisdiction, under the organic act or under the special statute, to consider any controversy which might arise between appellant and appellee;

Second. The issues in said cause did not admit of the adjudication of such a controversy, even if the court had jurisdiction, which it did not have;

Third. Because he did not know of the change of attitude of appellee Gordon in respect to the course of procedure to be followed until after the time for the taking of testimony had expired and the case had been closed;

Fourth. Because it was entirely immaterial to appellant, in the preservation of his rights as against appellee under their contract of March 28, 1906, as to the name of the party to said contract to whom the award should be made.

We submit that the plea of *res adjudicata* cannot be sustained, therefore, for the further reason that the contracts in controversy did not form the subject-matter of the proceeding before the Court of Claims and said proceeding was not had for the same purpose as that involved in this cause.

**D.**

*The appellant was not a party to the proceeding before the Court of Claims.*

It has been admitted in the testimony of appellee and otherwise shown in the statement that appellant was not a party, either plaintiff or defendant, in the proceeding before the Court of Claims and did not appear in that proceeding, either in person or by counsel, and no process was issued or served on him therein.

The Court of Appeals is in error in assuming that there was anything hostile to appellee involved in the testimony of or act of testifying by appellant. Quite the contrary. It was to the interest of both and clearly in harmony with the statute, that appellant, like other counsel, should show the value of his own services to the Indians, to the end that the value of those services should be reflected in the combined award against the funds of the Indians. His letter to appellee (R., 99) illustrates his attitude of concurrence, and his testimony in this cause (R., 75) shows that he received no word of dissent from appellee.

The Court of Appeals is also in error in assuming that appellant was seeking or expected an award in his own name. The record shows that appellee had stood by and allowed appellant to labor under the belief that the award was to be made, in harmony with the language of the statute, in the names of Butler and Vale. But even if appellant had been invited to and had joined with appellee in seeking awards in their respective names, it would not have been out of harmony with their contract of March 28, 1903, or in any way affected the right of appellant in this cause to insist upon a division between them under and in accordance with said contract.

It is true that he knew of the institution of the proceeding

and that he testified as a witness therein, but we submit that this did not make him a party, either in fact or in contemplation of law.

That proceeding was instituted by Butler and Vale under authority of the statute. However interpreted, the authority of Butler and Vale to institute and prosecute the proceeding was not conferred by the terms of the Raleigh agreement or other instrument to which appellant was a party, but by Congress, with the approval of the President, acting as the supreme authority of the United States in its capacity as guardian of the Indians, *and thus alone did the United States consent to be sued.*

It is true, as found by the Court of Claims, that Congress believed that there was in existence an agreement between all of the attorneys concerned in respect to the detailed distribution of such amount as might be collected among the attorneys interested; but the Court of Claims, with the agreement of April 12, 1905, before it and in the light of the repudiation by appellee of the authority of Butler and Vale and his denial that he was a copartner with Maish, whose estate was not represented in that agreement, concluded that the same was not what Congress thought it to be (an agreement between all parties interested), and that, "however extensive in morals as respects the assertion of claims in contravention thereto, has no standing *in the present controversy* (before the Court of Claims) which the court is obliged to respect" (R., 220).

Inasmuch as appellee Gordon bore the same relation to said agreement as did appellant, inasmuch as appellee, and not appellant, was present in Washington and co-operated in the adoption by the Conference Committee and Congress of the statute as framed, and inasmuch as his attitude in respect to the institution of the proceeding in the name of Butler and Vale was the same as that of appellant in the first place, and inasmuch as appellee was successful in his contention before the Court of Claims that the same

did not constitute the parties thereto as *cestui que trust* of Butler and Vale, we submit that appellant cannot be treated as or held to have been in any sense represented by Butler and Vale in said cause and appellee Gordon is estopped to so assert.

It is equally true that Butler and Vale were not, in any sense, counsel for appellant in that cause in respect to his present claim against appellee, which was not set up in the Court of Claims. He wrote Butler and Vale August 1, 1906 (R., 178), that: "If I have to make my own case, I shall make it in my own way."

And the case, as presented in this cause, is the way he has first asserted in court his rights to relief under his said contracts with appellee of March 21 and 28, 1906.

Having shown that the Court of Claims was without jurisdiction to or did consider or determine the controversy involved in this cause; that the same was not within the issues before the Court of Claims; that the contracts of March 21 and 28, 1906, did not form the subject-matter, and that the proceeding was not had for the same purpose as that involved herein, and, further, that the appellant was not a party to the proceeding before the Court of Claims, it is respectfully submitted that the defense of *res adjudicata* or equitable estoppel is not well founded in fact or in law.

### III.

*That upon the whole record the courts below should have held the appellee estopped to deny the right of appellant to the relief sought.*

The position assumed by the appellee in this cause is that the Court of Claims was a court of competent jurisdiction to hear and determine the controversy involved between appellant and appellee in the case at bar; that in legal effect appellant was a party to the case before the Court of Claims;

that independently of appellant's contention to the contrary and his explanation that their relations were only pertinent to the extent of showing privity with the Indians through appellee, appellee averred that the fact that appellant paid appellee's expenses to Washington and claimed a one-half interest in the joint awards apportionable to them were revealed by the testimony of appellant in that cause, and that the controversy here is, therefore, *res adjudicata*.

We submit that, according to appellee's own theory, in the light of the undisputed facts, that the conduct of the appellee in the Court of Claims and otherwise was such as to estop him from asserting the defense or receiving the benefits of the relief from his contractual obligations with the appellant, sought to be accorded him by the decrees of the courts below.

(A) *Appellee's Attitude in the Court of Claims Inconsistent With His Attitude in This Cause.*

It is a well-established proposition of law that where a party has, with knowledge of the facts, assumed a particular position in judicial proceedings, he is estopped to assume a position inconsistent therewith to the prejudice of an adverse party, and is estopped to make an inconsistent claim or to take a conflicting position in subsequent judicial proceeding to the prejudice of the adverse party.

*Davis vs. Wakelee*, 156 U. S., 680.

*Scholey vs. Rew*, 23 Wall., 331.

*Sample vs. Barnes*, 14 How., 70, 74-5.

In the case of *Davis vs. Wakelee* (*supra*) a judgment had been obtained by appellee on notes of appellant, a non-resident of California, where the action was brought and without personal service against the appellant, the defendant in said action. Appellee thereafter opposed the discharge of appellant in bankruptcy, and appellant moved in

bankruptcy proceeding to dismiss the specification of opposition thereto "upon the grounds that Wakelee (the appellee) had reduced his claim to judgment since the commencement of the bankruptcy proceeding; that such judgment was in full force, and (argumentatively) would be unaffected by the discharge." The bankruptcy court sustained the motion, although the judgment was clearly not a personal judgment under the principles laid down in *Pennoyer vs. Neff*, 95 U. S., 714; yet on the bill of the appellee as judgment creditor to enforce the estoppel involved in the action of the bankrupt in the bankruptcy proceedings, as stated, and to enjoin him from asserting a defense to any action which may be brought upon the judgment at law, this court held (syllabus) that:

"That D (appellant) was estopped in equity from claiming that it (the judgment) was void."

In the case of *Scholey vs. Rew* (*supra*) this court (syllabus) held that:

"3. An alien to whom a devise of an interest in real estate has been made, and who has received its value in proceedings for partition, is estopped to set up against a demand for a succession tax thereon, that under the law of the State where the estate is, the devise is absolutely null and void."

In the case of *Sample vs. Barnes*, 14th How., 70, 74-5, this court held (syllabus) that:

"Equity will not relieve against a judgment at law, where the defendant had a legal defense, which he omitted to set up and does not satisfactorily account for such omission."

Applying the principles involved in these cases to the conduct of appellee in the Court of Claims the pertinent record facts are as follows:

1. Appellee knew all of the facts and circumstances, including the claims of appellant:

2. He raised no issue in the Court of Claims with appellant under which a determination of the merits of the controversy between them could be had, even if that court had jurisdiction as he now contends;

3. In the matter of the intervening petition of Gwydir, Edwards, and Hall, as presented to that court, seeking an allowance out of what the court should find in favor of appellee and Maish's administrator, appellee asserted in the Court of Claims, directly contrary to his position in this cause, that the Court of Claims had no jurisdiction to consider a matter of that character, but was confined in its jurisdiction to the determination of claims for attorneys' fees as against the Indians and the United States as their trustee;

4. That appellee not only refrained from presenting to the Court of Claims an issue on which his present controversy with appellant could have alone been tried, but in his intervening petition (par. 8, R., 228) he represented to that court as follows:

"That it is not the wish or intention of your petitioner to disclaim the right to compensation to such persons or attorneys as rendered services under sub-contracts with Maish and Gordon in the former's lifetime or under sub-contracts entered into by your petitioner subsequent to Maish's death, *but it is the desire of your petitioner that such obligation shall be faithfully carried out according to the terms and the letter thereof.*"

5. That in addition to this, appellee admits in his testimony (R., 133) that before the Court of Claims he contended that all of the money to be awarded, based upon the services to the Indians under color of the Maish-Gordon

contract, should be awarded to him individually, he asserting "the right to receive this money in" his "name and to pay those men who were justly entitled to it under subcontracts from" appellee. (This did not include such amount as the court might award the administrator of Maish.)

We submit that the conduct of appellant before the Court of Claims adverse to the position taken in this cause, was successful to the extent, as shown by the proceedings before the Court of Claims by him exhibited, that there was no finding by the Court of Claims of the amount of the advances by appellant to appellee or the amount which appellee had contracted to pay appellant, and the awards in the name of appellant and in the name of appellee were confined strictly to the value of their respective services to the Indians; and the subject-matter of this proceeding was not adjudicated by the Court of Claims at all. Furthermore, in harmony with the contention of appellant before the Court of Claims, the principle adverse to any such adjudication by the Court of Claims was sustained in its action in dismissing the intervening petition of Gwydir, Edwards, and Hall; and this notwithstanding the fact that Gwydir, Edwards, and Hall presented before the Court of Claims equitable assignments, thereafter held to be valid and sustained against the award to appellee and Maish's administrator, both by the Supreme Court of the District of Columbia and the Court of Appeals.

*Gwydir et al. vs. Treat et al.*, 36 Wash. Law Rep., 694.

*Gordon vs. Gwydir et al.*, 34 D. C. Appeals, 508, 516.

(B) *Appellee's Attitude Toward and Concealment from Appellant.*

It is a well-established principle that where a person has, with knowledge of the fact, acted or conducted himself in a particular manner, or asserted a particular claim, title, or

right, he cannot afterwards assume a position inconsistent with such act, claim, or conduct to the prejudice of another.

Cyc., volume 16, page 785.

Williams *vs.* Payne, 7th D. C. Apps., 116.

Daniels *vs.* Tearney, 102 U. S., 415.

Scholey *vs.* Rew, 23d Wall., 331.

Turner *vs.* Flannigan, First Black, 491.

Watson *vs.* Bonfils, 116 Fed., 157.

Lemmon *vs.* U. S., 106 Fed., 650.

Harkrader *vs.* Carroll, 76th Fed., 474.

Howes *vs.* Marchant, 11th Fed. Cas., 6,240.

Cyc., volume 16, p. 787.

It has been repeatedly held that a person, by the acceptance of benefits, may be estopped from questioning the existence, validity, and effect of a contract.

Cyc., vol. 16, p. 787.

A.-W. Com. Co. *vs.* Patillo, 90th Fed., 628.

"The court will refuse its aid to one who remains silent when duty, candor, and fair dealing require him to speak out."

Ross *vs.* Elizabethtown and S. R. Co., 2 N. J. Eq., 422.

"If a person maintains silence when in conscience he ought to speak, equity will estop him from speaking when conscience requires him to be silent."

Hall *vs.* Fisher, 90th Barber, 17.

Applying these principles to the conduct of appellee toward the appellant, as revealed by the record, we have the following pertinent facts:

1. Under the contract of March 28, 1906, appellee and appellant agreed to divide equally the net amount which should be recovered by them under whatever name or theory, and agreed that "both parties hereto to mutually labor to secure such an allowance;"

2. Appellee admits (R., 134) that after the execution of the Raleigh agreement this contract of March 28, 1906, was in full force and effect, and asserts that the obligation was on appellant under that contract "to compensate R. D. Gwydir by a reasonable compensation" out of such share to be thereafter apportioned to appellant;

3. Appellant left Washington with the idea that their arrangements were definite and without question, and before action by Congress on the jurisdictional statute;

4. After the item had been framed as it finally passed, appellee admits (R., 130) that he intended to co-operate with Butler and Vale, to the end that they might file a petition, secure an award in their names, and divide the same under the Raleigh agreement.

5. He wrote referring Gwydir to appellant for information as to the arrangement effected, and by which alone his services were provided for, at least during the period he served appellee in co-operation with appellant (R., 166);

6. He wrote Gwydir and appellant to supply Butler and Vale with the documents needed (R., 88 and 183);

7. No word was ever communicated by appellee to (R., 75) appellant showing his subsequent disagreement with Butler and Vale or any change in his attitude or contemplated change in his plans (R., 75);

8. Upon the receipt by him of the letter of appellant of October 3, 1906 (R., 99), enclosing copy of appellant's deposition, he knew that appellant was continuing to act in accordance with the ideas and plans appellee had previously adopted and subsequently changed without notice to appellant;

9. The relations and circumstances were such as to demand that appellee should advise appellant of his change of plans, especially in view of the contents of said letter of October 3, 1906 (R., 99); \*

10. The time for taking testimony had closed before appellant discovered, without the aid of appellee, to wit, April 15, 1907, from a copy of the deposition of appellee of some months before, that there was friction between appellee and Butler and Vale and that there was a possibility of any hostility on the part of appellee to appellant;

11. That on October 31, 1907, when appellee filed his intervening petition in the Court of Claims, appellee was careful to avoid the possibility of any issue being raised between him and appellant in the Court of Claims, although he had *SECRETLY formed the purpose to avoid his obligations to appellant if possible*:

12. The fact of this purpose and his active concealment thereof is conclusively shown by appellee's letters to Gwydir dated November 18, 1907 (R., 179), and December 19, 1907 (R., 181).

"If we start any division of the fee in the court we are liable to have a lot of complication with these claims by these outside interlopers—but if all our friends will concentrate in asking the court to pay the fee to me—which is the only legal & the only right thing to do, I believe our fight against Butler & these outside schemers will be greatly strengthened \* \* \*. I will tell you all about Robertson when I see you—in meantime you may rest assured that I know whereof I speak—but keep your own counsel about this & steer clear of any deals with him.

"Treat my letters & all I say to you as strictly confidential—I believe we will win the fight here.

"Faithfully yours,

"HUGH H. GORDON."

13. After getting the jurisdictional statute through Congress, with the aid of all concerned, on the theory that they would all be protected under contract; after getting the benefit of having the matter brought within the terms of the jurisdictional statute by the submission of a petition in the name of Butler & Vale; after the attorneys interested, other than himself, had taken the trouble and borne all the expense incident to proving the value of the services of all counsel to the Indians; after getting, through the deposition of appellant, testimony as to the *only service rendered in favor of the Indians* after the expiration of the Maish-Gordon contract *at the instance of appellee* prior to March 1906; after all the testimony was closed—appellee first repudiates the binding force of the Raleigh agreement, but refrained, as above stated, from having any controversy with his subcontractors before the Court of Claims, including appellant; then, after awards were made in the names of appellant and appellee, aggregating the sum of \$16,000, appellee refused to divide the same equally with appellant under the terms of the March 28, 1906, as further evidenced by the Raleigh agreement, and comes into this court and seeks to deny, by oral testimony, the terms of the former written instrument, opposes the introduction in evidence of the latter written instrument, and, failing in all his other defenses, now seeks the benefit of the decree of the Court of Appeals, predicated upon the idea that the contract of March 28, 1906, was superseded by the Raleigh agreement, the binding force of which he also denies.

We submit that the doctrine of estoppel erroneously sought to be enforced by the Court of Appeals against appellant stands as an impenetrable barrier to the character of affirmative relief in favor of appellee, sought to be engrafted onto his defense of *res adjudicata*.

We submit that, independently of the points presented in parts II and III of this brief, the conduct of the appellee, both before the Court of Claims and otherwise, was so in-

consistent with his position in this court and the theory of relief sought to be accorded appellee by the Court of Appeals, that appellee is estopped from availing himself thereof as a matter of affirmative defense or otherwise.

#### IV.

##### *Appellee's Defense Based on Parole.*

*The first defense of appellee to the contract of March 28, 1903, to the effect that said contract was predicated wholly upon the condition that the appellant should secure a new contract with the Indians, is contrary to the terms of the written instrument itself, which cannot be attacked by oral testimony under the pleadings, and was not sustained by the evidence.*

This defense, although seriously urged by appellee in the lower court, could not have been sustained by that court or the Court of Appeals either upon the pleadings or the evidence.

The theory of the bill was that the contract of March 28, 1903, constituted a settlement and reduction to writing of the agreement between appellant and appellee. That instrument (R., 5), as set out in the bill, the execution of which by appellee was admitted in his answer (R., 39, par. 5), specifically provided in terms that they should share equally in the net result "growing out of the rendition of services to the Colville tribe of Indians, whether allowed *under the Muish-Gordon contract* with said tribes or on any other theory whatsoever, which said interest is to enure to either party, no matter in whose name such allowance is made."

The defense does not charge fraud or mistake in the execution of this instrument, but, without any such pleading, undertakes to vary the terms of this written contract by an averment directly contrary to that which appears upon

the face of the instrument itself, namely, that instead of appellee being admitted thereby into a share of what might be collected under the *Maish-Gordon contract* or any other theory, his participation in recoveries were wholly dependent upon his securing a new contract from the Indians, something which had been proven to be impossible in the past and what appellee himself admits was impossible and would have been of no avail in the light of facts existing at the time when the contract of March 28, 1906, was executed.

In support of his defense appellee submitted no written evidence originating at the time of or subsequent to the date of the contract, and, as seen from the statement of the case, the parts of the correspondence introduced, occurring prior to the date of the contract, taken as a whole, made the execution of the contract logical and proper and showed considerations both in expenditures and service in the interest of the appellee, besides the considerations apparent upon the face of the contract itself.

All of the testimony bearing directly upon the terms of the contract as finally executed on March 28, 1906, was the oral testimony of the appellee himself, incompetent and inadmissible under the pleadings because the same was introduced for the purpose of disputing the terms of the written instrument itself. The authorities on this subject are numberless, and directly opposed to the contention of appellee.

We will content ourselves with a statement of the well-known principle, and specifically call to the attention of the court only a few leading decisions of this court on this subject.

"It is a general rule, in courts both of law and equity, that wherever written instruments are appointed either by the requirement of law or by the compact of the parties to be the repositories and memorials of truth, any other evidence is ex-

cluded from being used either as a substitute for such instruments or to contradict, qualify or alter them."

9 Encycl. U. S. Sup. Ct. Rep., p. 14, citing No. Ass. Co. *vs.* G. V. Building Ass'n, 183 U. S., 308; Hunt *vs.* Rousmanier, 8 Wheaton, 174, and other cases.

"The language employed by the parties in making an instrument, and no other, must be used in ascertaining its meaning."

*Ibid.*, citing Waldon *vs.* Skinner, 101 U. S., 577, 585.

"The most usual application of the parole evidence rule is with respect to contracts, as to which it is established that in the absence of fraud or mistakes parole or other intrinsic evidence is not admissible to vary, add to, modify, or contradict the terms or provisions of the written instrument by showing the intentions of the parties or their real agreement with reference to the subject-matter to have been different from what is expressed in the writings."

Cyc., vol. 17, pp. 595-599, citing De Witt *vs.* Berry, 134 U. S., 306, and other cases.

"Where the parties have deliberately put their engagements into writing in such terms as import a legal obligation, without any uncertainty as to the object or extent of their engagement, *all previous negotiations and agreements with reference to the subject-matter are presumed to have been merged in the written contract*, and the whole engagement of the parties and the extent of their undertaking is presumed to have been reduced to writing."

Cyc., vol. 17, pp. 596-598.

"When parties have deliberately put their engagements into writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed, in the absence of fraud or mistake that the whole engagement of the parties and the extent and manner of their undertaking was reduced to writing, and as a general rule, parole or extrinsic evidence

is not admissible, to contradict, qualify, add to, or substantially vary the written contract. All oral testimony of previous or contemporary contracts, transactions and facts, or of conversations or declarations of the parties, so far as it tends to contradict, alter or modify the plain language of the writing, or affect the construction, must, as a general rule, be rejected." \* \* \* In the absence of fraud or mistake, it applies in a court of equity as well as in a court of law."

9 Encycl. U. S. Sp. Ct. Rep., pp. 15-17, citing Simpson *vs.* U. S., 172 U. S., 372; Sampson *vs.* U. S., 199 U. S., 397; Walden *vs.* Skinner, 101 U. S., 577-584; Brawley *vs.* U. S., 96 U. S., 167-173, and other cases.

Gavienzel *vs.* Crump, 22 Wall 308, 319.

"In the absence of fraud or mistake it applies in a court of equity as well as in a court of law."

Sprigg *vs.* Bank, 14th Peters, 201-206.

Walden *vs.* Skinner, 101 U. S., 577.

In the case of Simpson *vs.* The United States, 172 U. S., 372, the present Chief Justice, in delivering the opinion of this court, quoted with approval the language of Mr. Justice Bradley in the case of Brawley *vs.* The United States (*supra*), as follows:

"All this is irrelevant matter. The written contract merged all previous negotiations, and is presumed in law to express the final understanding of the parties. If the contract did not express the true agreement, it was the claimant's folly to have signed it. The court cannot be governed by any such outside considerations. Previous and contemporaneous transactions and facts may very properly be taken into consideration to ascertain the subject-matter of a contract, and the sense in which the parties may have used the particular term, but not to alter or modify the plain language which they have used."

In the case of *Walden vs. Skinner (supra)* this court said:

"Where no question of fraud or mistake is involved, the rule with respect to the admission of parole evidence to vary a written contract *is the same in courts of equity as those of common law*, the rule in both being that when an agreement is reduced to writing by the act and consent of the parties, the intent and meaning of the same must be sought in the instrument which they have chosen as the repository and evidence of their purpose, and not in extrinsic facts and allegations."

As has been suggested above, no foundation in pleading, either by cross-bill or otherwise, was laid by appellee averring fraud or mistake of fact, and this defense set up in his answer to the contract of March 28, 1906, is wholly unsupported by competent evidence and is not sustained by the record in this cause.

## V.

### *Equitable Assignment, March 21, 1906.*

The first defense to this instrument is that the same is contrary to the terms of the instrument itself, cannot be attacked by oral testimony under the pleadings and was not sustained by the evidence.

This instrument, based upon money advanced appellee by appellant (R., 173) on which to come to Washington in March, 1906, is set out in full in the bill and its execution is admitted by the answer. It reads as follows:

"150.00.

"BISCAYNE, FLORIDA, *Mch. 21st, 1906.*

"Received of F. C. Robertson, of Spokane, Washington, one hundred & fifty dollars, with which to pay expenses of trip to Washington, D. C., to look after the interests of Gordon, Gwydir and Robertson in the matter of the claims of the Indians of the

Colville Reservation against the U. S. Government.  
*In case we succeed in collecting said claim, I agree that out of my share of the profits, I will repay to* said Robertson, the said one hundred and fifty dollars (\$150.00).

**"HUGH H. GORDON."**

(Italics supplied.)

The defense to this instrument, set up in the answer (R., 40) of appellant, is as follows:

"The defendant admits the advancement of \$150.00 mentioned in the receipt set out by the complainant, but he says the object of said advancement was to prevent the approval of a contract obtained by other parties, which if approved would have prevented the said Robertson from obtaining said new contract, the procurement of which was the consideration for said agreement of March 28, 1,906, which consideration wholly failed by the failure of said complainant to obtain said new contract, the said Robertson not being required to, and never having performed any service in the prosecution of the claim of said Indians."

In other words, this defense is, in effect, that because appellee alleges he has a defense to another written instrument that therefore he can not be held under this instrument for the amount of money actually advanced on the strength of this particular equitable assignment.

As hereinbefore pointed out, there was exhibited to the answer the findings of fact, conclusions of law, and opinion of the Court of Claims (R., 202-222). Finding VIII of the Court of Claims sets forth actual services by appellant to the Indians, also that "in the early part of March, 1906, he went to Washington, D. C. *He paid the expenses of having Mr. Hugh Gordon come to Washington.*"

By Finding V of the Court of Claims, setting forth the services credited by that court to appellee, there is included the following: ..

"Said Hugh H. Gordon again went to Washington just before the close of the session in which the appropriation was made and did effectual service in securing that appropriation."

Thus, in legal effect, the answer of appellant contradicts the averment on which he seeks relief from his obligations contained in this written instrument. The instrument itself, as indicated by the words italicized, does not make payment dependent upon the success or failure of appellee in his effort to defeat the adverse contract, but if it did that contract was in effect defeated. Another part of the exhibit to the answer (R., 209-210) shows that Nuzum and Merritt Gordon, claiming under the McDonald contract, as well as McDonald himself, were all deprived of any participation whatsoever in the fund derived from the Indians in the payment of counsel fees.

The only condition contained in the instrument was that "*we succeed in collecting said claim.*" The success in the collection of the claim and the fund derived therefrom is the subject-matter of these proceedings, and the happening of this event cannot be questioned.

The appellee makes no averment of fraud or mistake, and does not deny, but admits, having received the full amount of \$150, on which the equitable assignment was based.

He does not contend by his pleading nor show by his evidence that this advance constituted one of the considerations for the contract of March 28, 1906. On the contrary, he testified (R., 123) that the matter was not mentioned on that occasion.

We submit that if the \$150 did not form a part of the consideration for the contract with appellant this alleged oral promise to return the receipt was without consideration and of no effect in law. If the promise to return the receipt was a part of the consideration for the contract with appellant, then appellee's whole position with respect to liability

thereunder is untenable, and he is estopped from the character of relief sought to be accorded him thereunder.

Appellee did write appellant May 26, 1906 (R., 88), *the next day after the agreement of the two Houses of Congress on the jurisdictional statute*, as it finally passed, requesting a return to him of this receipt.

The testimony of appellee in respect to this equitable assignment is not conformable to the so-called defense set up in his answer, the averments of which defense are inconsistent with the exhibit to the answer itself.

In the light of the attitude of appellee in this cause, seeking to avoid any and all obligations whatsoever to appellant and denying any obligation on his part to appellant on any of these agreements, there is no theory whatsoever on which the lower court or the Court of Appeals could have denied relief on the agreement for money advanced and also deprived appellant of relief against the appellee on this equitable assignment. Whatever may be the decision of this court on the other propositions submitted, therefore, the least this court could do would be to take appropriate action to reverse the decrees below for failure to give relief upon this equitable assignment, and place upon appellee the costs of these proceedings.

### **Conclusion.**

In conclusion, we submit that the appellant made out his case in the lower court; that none of the defenses pleaded were sustained; that the construction by the Supreme Court of the District of Columbia of the basic contract of March 28, 1906, was contrary to the legal principles involved and erroneous; that the construction of the scope of that contract by the Court of Appeals was correct and such as to "*warrant a recovery by Robertson*"; that said court erred in finding that the otherwise admitted right of appellant to recovery was altered by "the subsequent contracts and pro-

ceedings"; and that the proven conduct of appellee, both before the Court of Claims and otherwise in the premises, was such as to *estop* him from receiving the character of relief from his admitted obligation sought by the court below to be accorded.

We confidently crave a reversal of the decree of the Court of Appeals, affirming the decree of the lower court adverse to appellant, with appropriate directions in his favor.

GEORGE H. PATRICK,

GEORGE H. LAMAR,

*Counsel for Appellant.*

[18840]

WILLIAM ALLEN BOUT, U. S.

PUBLISHER.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1912.

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NO. 56.

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FREDERICK C. ROBERTSON, APPELLANT

vs.

HUGH H. GORDON, ET AL.

---

APPEAL FROM THE COURT OF APPEALS OF THE  
DISTRICT OF COLUMBIA.

---

BRIEF IN BEHALF OF APPELLEE, GORDON.

---

HENRY E. DAVIS,

*For Gordon, Appellee.*



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I.

**Statement of the Case.**

This is an appeal from a decree of the Court of Appeals of the District of Columbia, affirming a decree of the Supreme Court of the District, in a suit begun by the appellant in the lower court.

The controversy arose out of the claim of the appellant (hereinafter for convenience called Robertson), to be entitled to participate in a sum awarded by the Court of Claims of the United States to the appellee (for convenience hereinafter called Gordon), under the following conditions:

Certain Indians resident upon the Colville reservation in the State of Washington, and known generally as the Colville Indians, by a contract approved July 25, 1894, employed one Maish and Gordon to prosecute a claim of the Indians upon the United States, growing out of a treaty whereby the Indians had ceded and relinquished to the United States the northern portion of the said reservation. During the life of the contract Maish died, and Gordon thereafter associated with himself certain other attorneys, including the appellees, Butler and Vale, who subsequently became copartners under the name and style of Butler and Vale. Still during the life of the contract, one Nuzum and others claimed to have procured a contract or agreement of some kind (hereinafter called the McDonald contract), with the Indians in the matter, and to have rendered the Indians services thereunder.

Robertson also claimed to be interested in the premises through association with Gordon, and there were others not now necessary to be considered, claiming to be entitled to participation in whatever fees the Indians should be required to pay, by reason of services claimed to have been rendered Maish and Gordon in respect of procuring the original contract, and also for services claimed to have been rendered to the Indians directly.

In the spring of 1906, when Congress was about to make an appropriation in discharge of its agreement with the Indians, the questions, what attorneys were entitled to compensation for their services in the premises, and the extent to which they were respectively entitled to compensation, arose, which questions were finally undertaken to be settled through a reference of the whole matter by Congress to the Court of Claims, which court ultimately disposed of it by making individual awards to Maish's administrator, Gordon,

Butler, Vale, one Henderson, one May, and Robertson, aggregating in all Sixty Thousand Dollars (\$60,000.00), of which Fourteen Thousand Dollars (\$14,000.00) were awarded to Gordon, and Two thousand Dollars (\$2,000.00) to Robertson (Rec. 222).

Robertson claimed that he was entitled to have the awards to himself and Gordon added together and equally divided between the two, and it was to enforce this claim that the bill in equity was filed in the Supreme Court of the District of Columbia.

In addition to the appellees, the Secretary of the Treasury, the Secretary of the Interior, and the Treasurer of the United States were made parties defendant to the bill, the essential and material allegations of which are as follows:

The Indians entered into a contract with Maish and Gordon for a compensation equal to 15% of any money which might be collected for the Indians under the provisions of the contract, which compensation was reduced to 10% by the Commissioner of Indian Affairs and Secretary of the Interior when approving the contract. The contract by its terms continued in force for ten years from the date of its final approval, to wit, until July 26, 1904, but it was thereafter impliedly continued in force, and, at the time of the filing of the bill, was yet in full force and effect by virtue of continued service thereunder, recognized, acquiesced in and confirmed by the United States, the Indians and Congress, and by those claiming under the contract, including Robertson, Gordon, Butler, and Vale, "to the extent that the said contract was held and considered an element in determining the amount of compensation for such services, and for all services rendered by the said and all other attorneys in the said matter" (Rec. 2-3).

Maish and Gordon entered into arrangements and agreements with Robertson to assist in prosecuting and securing the collection and payment of the claims of the Indians, and, in consideration of the assistance which Robertson agreed to furnish and furnished to him, Gordon agreed to admit and did admit Robertson to an equal copartnership to share with him therein, and agreed that Robertson should be paid and receive certain compensation, which arrangements and agreements were afterwards adjudged, settled and reduced to writing between Robertson and Gordon March 28, 1906 (Rec. 3-4), whereby Robertson and Gordon were given an undivided equal share and ownership in and a lien upon their respective claims, each upon the other's, and upon any award and awards made on account of the same in payment and satisfaction of the said claims (Rec. 4).

Such prosecution of the claims of the Indians followed that the same were recognized and provided to be paid by the United States to the Indians by Act of Congress of June 21, 1906, in and by which act jurisdiction was conferred upon the Court of Claims to hear, determine, and render final judgment in the name of Butler and Vale for the amount of compensation to be paid to the attorneys who had performed services as counsel on behalf of the Indians in the premises (Rec. 5); and the fund provided for the Indians, or so much thereof as had not already been appropriated and paid to and received by them, was held in trust in the Treasury of the United States subject to the claims and liens of Robertson, Butler, Vale, and Gordon (Rec. 6, fol. 5).

Under the Act of Congress of June 21, 1906, Butler and Vale duly entered suit in the Court of Claims, and such proceedings were had in said suit that that court made the following allowances:

To Benjamin Miller, Administrator of the Estate of Levi Maish, deceased	\$ 6,000
To Hugh H. Gordon	14,000
To Marion Butler	20,000
To Josiah Vale	10,000
To Daniel B. Henderson	5,000
To Heber J. May	3,000
To Frederick C. Robertson	2,000

and the findings, judgment, award, and decree of that court were about to be certified by it to the Treasury Department of the United States for payment (Rec. 7-8). Of the amount provided by Congress for the Indians in the premises an installment of Three hundred thousand Dollars (\$300,000.00) was at the time of the filing of the bill in the Treasury of the United States, of which installment Sixty thousand Dollars (\$60,000) was subject to be drawn therefrom in a lump sum by Butler and Vale, or the sum of Fourteen thousand Dollars (\$14,000) by Gordon and the sum of Two thousand Dollars (\$2,000) by Robertson under the findings and award of the Court of Claims aforesaid (Rec. 8-9).

The services rendered by Robertson and Gordon were recognized by the Court of Claims by the award to them respectively of Fourteen thousand Dollars (\$14,000) and Two thousand Dollars (\$2,000) or Sixteen thousand Dollars (\$16,000) in all, as the value of their joint and several services to the Indians, but the court made no judgment, decree or division between the parties in respect of any agreements or contracts among themselves, and such matter of agreement, contract or division was not submitted to and was not before the said court, but was expressly disclaimed by the court in its decision, which adjudged only the claims and demands of the several attorneys directly against and for the benefit of the Indians, and Robertson was entitled to share equally in the gross sum of Sixteen thousand

Dollars (\$16,000) awarded to Gordon and him in the proportion of Eight thousand Dollars (\$8,000) to each (Rec. 9). By appropriate prayers, the bill asked injunctions as follows: (1) Against Gordon from collecting the award to him, either individually or through Butler and Vale; (2) Against Butler and Vale from receiving the awards to Gordon and Robertson; (3) Against the Secretary of the Treasury from paying to Gordon, Butler, and Vale, the amount of the award to Gordon, and from paying out to anyone any portion of the said sum of Sixteen thousand Dollars (\$16,000), except as directed by the court; (4) Against the Secretary of the Interior from receiving from Gordon, Butler and Vale a satisfaction or discharge of their claims for services rendered the Indians, except as directed by the court; and (5) Against the Treasurer of the United States from paying to Gordon, Butler and Vale the amount of the award to Gordon, except as directed by the court (Rec. 12-13).

The bill also prayed that Butler and Vale be adjudged to have no interest in the sums awarded to Robertson and Gordon; that a receiver or receivers be appointed to collect from the Treasurer of the United States any warrant or other evidence of indebtedness issued or to be issued in payment and settlement of the awards to Gordon, to Butler and Vale, to the use of Gordon, and to Robertson, either and all of them; and that Robertson might be adjudged to have a lien upon and interest and ownership in the awards to himself and Gordon and the fund to arise thereon (Rec. 13).

By order in that behalf Gordon and Butler and Vale were enjoined substantially as prayed (Rec. 18), and subsequently receivers were appointed to demand and receive the Fourteen thousand Dollars (\$14,000) awarded to Gor-

don, the Two thousand Dollars (\$2,000) awarded to Robertson, and the Six thousand Dollars (\$6,000) awarded to Maish's administrator (Rec. 20-21).

Upon receipt by the receivers of the moneys in question, the Secretary of the Treasury, the Secretary of the Interior, and the Treasurer of the United States were eliminated from the cause.

Gordon answered the bill, and exceptions being taken to his answer and part sustained, he made further answer accordingly (Rec. 21-27; 38-42).

The essential and material allegations of Gordon's answer are as follows:

Maish and Gordon never employed Robertson, or made any agreement of any character with him, Maish having died in February, 1899, five years before Gordon ever heard of Robertson (Rec. 22, fol. 25). Gordon never made or contemplated any agreement, either written or verbal, with Robertson in any manner relating to the claim of the Indians, which did not contemplate and have for its sole basis the securing of a new contract with the Indians (*Ibid*). The contemplated new contract with the Indians never having been secured, the agreement of March 28, 1906, is void for want of consideration; and as after its date Robertson did not and could not render any service to Gordon or to the Indians, the consideration for any claim of Robertson upon Gordon totally failed (Rec. 26, fol. 32-3). Robertson having submitted himself to the jurisdiction of the Court of Claims in the premises is bound by its action and the matter of his claim upon Gordon is therefore *res judicata* (Rec. 26-27).

These contentions are set up by Gordon in his original

answer, and, so far as essential and material, the remaining allegations thereof and of his amended answer are merely in amplification and fortification thereof. As respects the effect of the action of the Court of Claims in the premises, the amended answer (Rec. 41, fols. 56-7) sets forth as follows:

"Defendant denies that the complainant rendered 'extensive, laborious or important' service as alleged in paragraph 8 of the bill, or that any allowance to the defendant was the result of any service of the complainant jointly with defendant or otherwise, but says in fact that the claims of the complainant, if any, were fully presented to the Court of Claims and fully and finally adjudicated, and he denies all allegations relative to any division or right of division between himself and said Robertson; and he here suggests and urges that this court has no jurisdiction to consider or allow any claim of the complainant in the premises for the reasons appearing in this paragraph. And in response to the plaintiff's allegations that the Court of Claims made no judgment, decree or division between the parties in respect of any agreements or contracts among themselves, this defendant avers that the complainant, in the said Court of Claims, appeared and submitted his claim to one-half of the compensation to be awarded to this defendant, and the defendant is advised and believes, and upon such information and belief avers, that the complainant was in all legal respects a party to the said cause in the said Court of Claims; that he submitted to, and the said Court had, jurisdiction to hear and determine his rights, and as the defendant expects to prove at the trial of this cause, the complainant elected to stand, as against this defendant, as well as the Colville Indians and the United States, upon the reasonable value of the services he claimed and claims to have rendered in the premises, and this defendant claims the benefit of said election and the estoppel resulting therefrom, and therefore

avers the title and claim of the said complainant here presented is a thing adjudicated by the Court of Claims against the said complainant and is not a subject for inquiry by this Court."

As upon receipt of the moneys in question by the receivers appointed in the cause, the Secretaries of the Treasury and of the Interior and the Treasurer of the United States were eliminated as parties, so also it has been assumed that Butler and Vale, though appearing as appellees, have no further interest in the premises; and both the courts below and counsel for Robertson in this court have acted on this assumption. Whether the assumption be justified is adverted to hereinafter.

## II.

### **Argument.**

Robertson's claim upon Gordon rests upon the memorandum of March 28, 1906, by which, as Robertson contends, the "arrangements and agreements" between the two were "adjudged settled and reduced to writing between them" (Rec. 3-4, fol. 3) as follows (Rec. 4, fol. 3):

"This agreement made between F. C. Robertson and Hugh H. Gordon, Witnesseth, that they shall share equally in all monies appropriated by Congress, or allowed by the Interior Department, which may accrue to said Gordon or said Robertson as attorney fees, growing out of the rendition of services to the Colville tribe of Indians, whether allowed under the Maish-Gordon contract with said tribes, or on any other theory whatsoever, which said interest is to inure to either party, no matter in whose name such allowance is made. Both parties hereto to mutually labor to secure such allowance. Out of said Robertson's share

he agrees to compensate R. D. Gwydir by a reasonable compensation. The fees to be divided between said Robertson and said Gordon as herein provided shall be the net sum accruing to said Gordon, after settling with other attorneys under contracts heretofore made by said Gordon."

As Robertson's claim rests upon this memorandum, and Gordon's contentions are, first, that the agreement thereby evidenced was made solely in contemplation of a new agreement with the Indians, and, second, that the agreement was superseded and supplanted by what followed, it is essential to consider the circumstances leading up to and existing at the date of the memorandum and the subsequent conduct of the parties.

#### *1. Situation and action of parties on March 28, 1906.*

The contract between the Colville Indians and Maish and Gordon was executed by the Indians May 12, 1891 (Rec. 91, fol. 119), and by Maish and Gordon July 5, 1891 (Rec. 93, fol. 155). It was approved by the Acting Secretary of the Interior July 25, 1894 (Rec. 94, fol. 156), so that by its terms (Rec. 90-91), and as decided by the Court of Claims (Rec. 211), it expired July 25, 1904.

Maish died in February, 1899 (Rec. 207), or about five and a half years before the expiration of the contract.

As by the terms of the contract appears, Maish and Gordon were to act as attorneys for the Indians before the Courts, the Departments of the Government, the Congress of the United States, or any other tribunal which might take cognizance of the claims of the Indians (Rec. 89-90), all of which obviously contemplated work to be done at the City of Washington.

After the death of Maish, Gordon associated Butler and

Vale in the matter, and they, being on the spot, were in effect in charge of the active prosecution of the claims.

Robertson's first relation to the matter confessedly was some time in the early part of the year 1904, when it was brought to his attention by one Gwydir (Rec. 68, fol. 104), who had been instrumental in procuring the Maish and Gordon contract (Rec. 58-59). Some time prior to August 24, 1903, Gordon had written Gwydir, requesting him to try to get an extension of the contract, which letter Gwydir answered (Rec. 59, fol. 86), and in reply received from Gordon, under date of August 24, 1903 (Exhibit B, Rec. 151), a letter expressing Gordon's gratification at learning that an extension of the contract might be secured. On February 2, 1904 (Exhibit C, Rec. 153), on April 16, 1904 (Exhibit D, Rec. 155), and April 22, 1904 (Exhibit G, Rec. 159), Gordon wrote further to Gwydir on the subject, but by the latter date Gordon's effort had distinctively taken the shape of an attempt to procure a new contract with the Indians, instead of merely an extension of the original contract. Robertson's first direct communication with Gordon was after the last-mentioned day, namely, on May 9, 1904 (Rec. 23).

From the testimony of both Gwydir and Robertson, as well as from the correspondence itself, it is too plain for discussion that Robertson's relation to the matter began with an endeavor to procure a new contract or an extension of the old: Robertson's own statement is that Gwydir told him that Gordon wanted some one out West "to look out for the Indians under the Maish-Gordon contract, and that as this contract was about to expire, to assist and advise with reference to the procuring of a new contract or the extension of the old" (Rec. 68, fol. 104), and that he "then started in to labor generally for the success, first, of the recovery for the Indians of this money, secondly, to deter-

mine what should be done with reference to a new contract" (Rec. 69, fols. 104-5). Again, it is too plain for discussion that, as there could possibly be no work done away from Washington by way of "looking out for the Indians under the Maish-Gordon contract," or the recovery for them of the money in question, the statements by Robertson in respect of these particulars must be treated as the result of afterthought; the fact being clear that all that he at that time could possibly have undertaken in the premises was the securing of an extension of the old contract or the obtaining of a new.

Continuing his story, Robertson says that he discussed with Gwydir very fully his, Robertson's, views as to a new contract, pointing out, in the first place, that the execution of a new contract would be a repudiation of the old, and, secondly, that he did not want to make any contract respecting which bad faith towards Butler and Vale and other persons at Washington could be claimed (Rec. 69-70). Some time later Robertson learned that a former Indian agent named Anderson claimed to have obtained a new contract with the Indians (the McDonald contract, so-called), in which one Nuzum and one Judge Merritt Gordon claimed to be interested (Rec. 70, fols. 107-8; and Nuzum informed Robertson that he had entered into some new deal, under the alleged new contract, with Butler and Vale, so that the latter stood in a position, as Robertson believed, of having the right to claim that they worked, first, under the old Maish-Gordon contract, and, secondly, under the new Anderson or McDonald contract; and he felt that, should the Department approve the new contract, his and Gordon's rights would be seriously prejudiced, unless they had a full and cordial understanding with Butler and Vale (Rec. 70, fol. 108). These reasons, according to Robertson, induced him to adhere to the effort to procure an extension of the old contract rather than the execution of a new one.

It developed that there were three obstacles in the way of procuring either a new contract or an extension of the old, namely: 1. The unwillingness of the Indians to make any further agreement of what kind soever, because of alleged bad faith on the part of the United States towards them; 2. The opposition of the Department of the Interior, or the Indian Office of that Department, to the making by the Indians of any further agreements with attorneys; and 3. The setting up of the McDonald contract alleged to have been made by the Indians in disregard of the Maish-Gordon contract.

As respects the first, the treaty with the Indians out of which their claim upon the United States arose had reference to the north half of the reservation, and the United States had raised the question of its liability under its agreement with the Indians, upon the ground that the Indians had had no title to the lands undertaken to be ceded and relinquished, and that, therefore, the agreement of the United States to pay the Indians for the lands was without consideration (Rec. 62; 69, fols. 105-6). At the same time, the United States was negotiating with the Indians with reference to the south half of the reservation (*Ibid.*), and when Gwydir went to the Indians with a view to securing a new contract or an extension of the old, he found the Indians opposed to making either any further treaty with the United States or any further contract with the attorneys until the earlier treaty had been carried out (Rec. 62, fol. 92). Robertson encouraged the Indians in their refusal to deal further with the United States (Rec. 71, fol. 110), and Gwydir was instructed by him accordingly. Speaking with reference to preventing the Indians from entering into new negotiations until the Government recognized the former claim, obviously meaning new negotiations with the Government, Gwydir says: "I was instructed to keep the Indians for the old contract and not to make any new treaty

or contract until the terms of the old treaty were fulfilled (Rec. 62, fol. 92), meaning that until the Indians got their money under the first treaty they should not agree to the opening of the south half of the reservation (Rec. 62-3, fol. 92-3). Ultimately Gwydir prevailed upon the Indians to assent to extend the Maish-Gordon contract, but still with the reservation on the part of the Indians that they would have no dealings with the Government until the subject of that contract, namely, their claims under the former treaty, were satisfied (Rec. 63, fol. 93).

Obviously, this manner of getting rid of the first obstacle was not very helpful in overcoming the second, namely, the opposition of the Indian Office to the making by the Indians of any further contracts with attorneys, the conduct of some of whom on the ground is thus seen to have tended to stiffen the Indians in their unwillingness to treat further with the Government. But, however this may be, consideration of the opposition of the Indian Office in the premises appears throughout. Nuzum states that he was told by members of the Conference Committee that the Indian Department said that the Indians did not need any attorney, and that they were opposing the attorneys always on the floor of the Senate (Rec. 56, fol. 49); Robertson asserts that Gordon claimed to have been informed by Butler and Vale that the Department had refused to grant them permission to go on the reservation and secure a new contract or the extension of the old (Rec. 69, fol. 105), and that he felt certain that, after the Department had refused Butler and Vale the right to execute a new contract, if he clandestinely went on the reservation and pretended to sign individual Indians the Government, by departmental action, might formally revoke the Maish-Gordon contract (Rec. 70, fol. 106); and Gwydir declares that, having found that he would not be permitted to go on and negotiate a new con-

tract with the Indians, and that the Government was opposed to that, he knew that the result would have been that had he attempted to get a new contract under the circumstances he would have been put off the reservation, and, if he insisted, would have been put in prison (Rec. 63, fol. 93-4).

It was about this time that the third obstacle appeared, namely, the existence of the McDonald contract, which professed to supersede that with Maish and Gordon. Of this contract Robertson says that he "did not learn for a long time" (Rec. 70, fol. 107), but he manifestly knew of it in the latter part of 1905, when the Indians were in conference on the call of the Government, with the object of procuring the consent of the Indians to open the other reservation lands, for he then sent Gwydir to the conference, instructing him to prevent at all hazards the approval of the McDonald contract by the council of Indians. At the same time, he prepared and sent by Gwydir a paper for the Indians to sign, being in effect a waiver of the time limit of the Maish-Gordon contract and a revocation of all contracts other than it. (Rec. 70-71; Exhibit Q, Rec. 166-1.)

Following this action, Robertson wrote Gordon January 8, 1906, a letter (Exhibit Q, Rec. 168), which, and Gordon's reply thereto of February 8, 1906 (Exhibit R, Rec. 170), are now attempted to be made by Robertson among the most important supports of his endeavor to overcome Gordon's contention that their relations and negotiations down to and including the memorandum of March 28, 1906, had reference to the procurement of new contract relations with the Indians, and that exclusively; and these letters are in reality important, but for a wholly different reason and with a wholly different effect than pretended or assumed by Robertson.

The manner in which these two letters are treated in the brief for the appellant, Robertson, in which are set forth unrelated extracts, some of which substitute asterisks for portions of the context essential to a proper understanding, and in one of which (page 21, at top, where the word "but," instead of being given with a capital initial letter, is given with a small initial, as though the expression which it introduces were part of a continuous sentence, instead of being, as the fact is, an independent sentence), the typography is so changed as to give a wholly erroneous meaning, requires that the letters should receive somewhat extended consideration.

It will be noted that Exhibit O (Rec. 166-1), being the memorandum prepared by Robertson and given to Gwydir for execution by the Indians bears date "the \_\_\_\_\_ day of December, 1905." As appears from Gordon's letter to Gwydir of December 18, 1905 (Exhibit H, Rec. 160), Gwydir had written Gordon on the 6th of the month a letter which does not appear in the record. The extract, given in the brief for the appellant, of this letter of Gordon's of December 18, 1905, omits the very important sentence preceding what is given in the brief, namely:

"I note what you say about other parties trying to secure contract with the Indians, and hasten to assure you and Mr. Robertson that I am in no way connected with any party or parties attempting to secure that contract, except yourself and Mr. Robertson." (Rec. 160, fol. 286.)

Consideration of this language is necessary to an understanding of the point of Gordon's protestation in respect of good faith, which, without consideration of the language, would appear simply gratuitous.

Manifestly Gwydir's letter to Gordon of December 6,

1905, gave the latter his first intimation that others were attempting to secure a contract with the Indians, and whether or not Robertson saw Gordon's reply of December 18, 1905, the fact is that Robertson wrote Gordon January 8, 1906, the letter under consideration, which appears, however, not to have been mailed until January 16, 1906 (Rec. 168, fol. 301).

This letter of January 8, 1906, is full of significance, and, for its full import, should be read in its entirety.

Thus read, it discloses treatment of the following matters, though not in the order here given: 1. Explanation of the procuring of the McDonald contract; 2. Consideration of the rights of the Indians against the United States, growing out of the original agreement between the Indians and the United States, and the possible manner of asserting the rights of the Indians in the premises; and 3. The attempt to procure a new contract with the Indians in the interest of Gordon and his associates.

1. As respects the first, the letter discloses that the way in which the obtaining of the McDonald contract came about was this: Robertson took the matter up with Anderson before the latter went to McDonald, and Anderson played Robertson false—using Robertson's own language, Anderson, in the "parlance of the West" (Rec. 170, fol. 304), gave him "the double cross"—and got the contract for himself and associates in the name of McDonald. This brought Nuzum and Judge Gordon into the matter, and when Robertson protested to McDonald in the premises, he got no favorable response, and therefore assumed that nothing could be accomplished in that quarter (Rec. 168-9, fol. 302), and Robertson asked Gordon whether it would "not be wise to have the matter looked up at once so that the

Anderson contract would be knocked out" (Rec. 169, fol. 304).

2. As respects the second, Robertson conceived it possible that, by virtue of the agreement between the United States and the Indians, the latter might bring an action against the United States for the fifteen hundred thousand dollars (\$1,500,000) involved, expressing the somewhat obscure opinion that "if such a procedure could be undertaken and we could secure an agreement for extension of the contract, and begin this action, it would be a substantial claim against the Government, which, in my opinion, could be enforced" (Rec. 169, fol. 303).

3. As respects the third, Robertson wrote as follows:

"Myself and associates sent Major Gwydir to the Indian conference to see what could be done. You are probably aware of the fact that the Government claims to have secured a supplemental agreement, practically abrogating all other agreements with the Indians. I am informed that one of the purposes of this agreement was to prevent the claim for counsel fees under the old contract. I instructed Major Gwydir to ascertain if he could sign up a new contract, but owing to the presence of Government officials, and the chance to incur enmity in the Department, he did not do anything. *I understood that the old Maish-Gordon contract had in some way become blended with the new contract secured with the Indians through former Indian Agent Anderson and McDonald.* AND THINKING THAT YOU HAD BECOME RESTLESS WITH US HERE, I KIND OF DISMISSED THE MATTER FROM MY MIND. You originally advised us to wait in this Indian matter, and I let it go by, but I feel satisfied now that the Indians could extend the time of this contract now as well as they could before the contract expired. For both

would stand or fall independent of the approval of the Department. *I probably neglected the securing of the contract, not only on account of your suggestion that I wait, but also on account of the great stress of business.*" (Rec. 168, fol. 301.)

And this Robertson followed with this statement:

"It may be that I could secure an extension of this [Maish-Gordon] contract, but it seems to me that it would be a wise thing to attempt to get the approval of the Department for our right to do so, if this can possibly be accomplished." (Rec. 169, fol. 302.)

This letter of Robertson's is, accordingly, most significant in the following respects: First,—He had an idea that the Indians could get compensation for their lands, in accordance with their original agreement with the United States, by suing the latter in the District Court in the State of Washington, where he was; in other words, he had an idea that the redress which the Indians were seeking could be obtained by a suit in Court *independently of any possible action by Congress*; secondly,—It was his own manner of handling the matter of getting a new contract or an extension of the old, in Gordon's interest, that put McDonald and his associates on notice and led to themselves undertaking to get an agreement with the Indians to Gordon's exclusion; and, thirdly,—Robertson confessed negligence in the matter of attempting to secure the new contract and bluntly admitted that he had dismissed the matter from his mind. In its essence, the letter is thus seen to be a practical throwing up of his hands by Robertson, accompanied by an ill-defined suggestion that, in the same "parlance of the West" resorted to in the letter, it was "up to" Gordon to devise a solution of the situation.

Gordon's reply is no less significant than Robertson's letter:

1. He expresses the opinion that if Anderson could have got a contract with the Indians, Gwydir could as well have done so, and that the latter made a fatal mistake in not going in and getting the contract before Anderson (Rec. 172-3, fol. 310).
2. He answers Robertson's suggestion about the Indians going into court as follows:

"In regard to the validity of the claims of the Indians to the \$1,500,000 under the contract made with the Commissioners of the Government, there is not the slightest question in my mind as to their equitable right to compensation for the surrender of lands and I am confident that the courts would so decide, if permitted to take jurisdiction— The trouble, however, is in getting a legal status in the Courts— I may possibly be in error, but my impression is that the Indians cannot inaugurate a suit against the Government, without the consent of Congress. There are I think but two avenues for redress open to them. One is to secure by a Bill in Congress a direct appropriation for the payment of their claims; and the other is to secure by Bill or 'Joint Resolution' the reference of the claim or the case to the Court of Claims." (Rec. 171, fols. 307-8.)

3. And he answers Robertson's attempt to throw upon him responsibility for Robertson's own practically admitted neglect in the matter as follows:

"I think you are mistaken in your impression that I advised any delay in securing the new contract with the Indians. If you will refer to my former letter

to you and to my correspondence with Gwydir I am confident that you will find that I urged as prompt action as possible— I know that you and Gwydir were greatly delayed, primarily, by my failure to get the forms of the new contract to you as promptly as I desired; but this was really not my fault— The delay was caused by my depending upon Butler and his associates to prepare and forward the papers as they had agreed to do when I was in Washington. All this, however, was gone over by me in former correspondence with you and Gwydir and it is not necessary to recapitulate." (Rec. 170-1, fol. 306.)

And, replying to Robertson's suggestion as to what Gordon should do in the matter, Gordon wrote as follows:

"In view of the complications which have arisen since we first decided to try for a new contract, it is an exceedingly difficult thing to determine what is our wisest course— I am sorely disappointed that you and Gwydir did not push right ahead and secure the new contract as soon as the papers reached you— That would have eliminated the complication growing out of the Anderson-McDonald contract—and we could have taken our chances of securing the approval of the contract by the authorities in Washington— But as we did not secure the new contract we will have to do the best we can under present conditions.

"It would of course be a most excellent thing for us if we could secure the permission of the Department to go on the Reservation and make a new contract with the Indians; but I am not at all sure that the Department will give in advance its official sanction to a proposed contract— My recollection is that Gwydir got the Maish-Gordon contract without our asking permission in advance; but of this I am not positive— Gwydir will probably remember about this. At any rate it will be necessary for me *to go to Washington and attend to it personally*— I don't believe anything

can be accomplished by correspondence." (Rec. 171 fol. 308).

And Gordon, after having stated,

"The tr[ib]l is I am so much in the dark as to tie exact situation out there and in Washington, that I cannot advise you or counsel with you intelligently—I have no faith whatever in any promises from those other parties to take care [of] our interests" (Rec. 172, fol. 310).

winds up his letter, plainly having reference to continued efforts to secure an extension of the contract, as follows:

"I fear, however, that the failure to secure the contract ahead of the Anderson crowd was an irreparable mistake— If you can give me any comforting news I would be glad to have you do so" (Rec. 173, fol. 310.)

Very plainly there is no justification for the meaning now attempted to be extracted by Robertson from these two letters (Appellant's brief, 19-21), namely, that Robertson was conveying to Gordon the idea that he (Robertson) was "then interested under the original Maish-Gordon contract," and that Gordon in effect assented thereto; on the contrary, the letters have and can have no other meaning than that above attributed to them, namely, that Robertson had practically abandoned the enterprise of securing the new contract or an extension of the old, and was making for his neglect in the premises the lame excuse that Gordon was in part to blame for the delay which enabled the McDonald contract to be procured; and Gordon on his part was disclaiming any responsibility in the premises and putting the responsibility where it belonged, namely, on

Robertson, and was, in addition, inciting Robertson to further effort. This attempt on the part of Robertson to cause it to appear that at the date of these letters he had a recognized interest in the Maish-Gordon contract is in keeping with the production by him before the Court of Claims of the testimony, whatever it was, that induced that Court to find that he (Robertson) went to the City of Washington "in the early part of March, 1906" (Rec. 208, Finding VIII), more particularly noticed hereinafter.

Nor does any greater success attend Robertson's attempt (Appellant's brief 22-3), to give to the letters which passed between him (Rec. 173-4), and Gordon (Rec. 87), of March 10, 1906, the meaning that there was recognized by Gordon an interest of him, Robertson, in the matter, independently of the securing of a new contract or an extension of the old.

True it is that Robertson's letter contains various references to "our interest there," meaning at the City of Washington, and also refers Gordon to certain persons believed to be helpful in the protection thereof, but the letter also contains such expressions as the following: "I do not believe that without the recognition of *your* contract any subsequent contract with the Indians can be put through over your opposition" (Rec. 173, fol. 312); "You should be on the ground there and protect *your* interests" (Rec. 174, fol. 313); "I believe that an approved agreement such as *you* have, is much better than any approved agreement such as Anderson had" (Rec. 174, fols. 313-14); "The compensation could be made to *the attorneys*, should *you* establish *their* rights at law or in equity to compensation" (Rec. 174, fol. 314); and "If you desire me to get *additional agreements* with the Indians here on your arrival in Wash-

ington, wire me fully, and I will send a representative there" (Rec. 174, fol. 313).

On the other hand, in his letter of that date Gordon wrote:

"We ought to have a well-defined program of the campaign we propose to make *in Washington*, and it is a great pity that our consultations must be had through the very slow and unsatisfactory medium of correspondence. You and Gwydir, who are on the ground, must strengthen my hands with the strongest case you can make out, and you must also write me fully making such suggestions as may occur to you. \* \* \* I am frank to say that I have many misgivings about the issue. It is going to be very difficult to induce the Department to set aside the other parties and give us leeway unless we can present an exceptionally strong case. \* \* \* But I will go and do my best. Send me complete data and your suggestions." (Rec. 87, fols. 140-1).

Beyond peradventure, so far as the two men appear from these letters to have been of one mind about anything, it was about preventing the approval of the McDonald contract and securing either an extension of the Maish-Gordon contract or the execution of a new one. In this behalf, Robertson and Gordon were, of course, interested in common, just as Gwydir was interested.—whose interest, however, as found by the Court of Claims, according to the fact, was for the rendition of services to Maish and Gordon in procuring the original contract, and not at all to the Indians (Rec. 212, Finding XV). Quite properly, therefore, Robertson might speak of "our interest," and of being protected "in this old agreement" (Rec. 174, fol. 313), without conveying to Gordon any idea that such interest was independent of the contemplated new agreement with the Indians. But, however this may be, it is very

clear that in his letter Gordon had in mind the contemplated new agreement and nothing else. It is impossible to read his letter and to get from it any other impression; he promises to go to Washington, though with misgivings as to the result, with the object of inducing the Department to set aside the McDonald contract and to give him self and Robertson what he calls "leeway" for the enterprise of procuring the contemplated new agreement; and to this end he invites suggestions as to a plan of the campaign to be made in Washington, asks Robertson and Twydril to make out the strongest case they can in the premises, and closes with the request to Robertson for "complete data and your suggestions."

The two men being in the attitude of mind thus indicated, and each being convinced of the desirability of executing the contemplated campaign on the spot at the City of Washington, Robertson sent Gordon the necessary money for his expenses, and on March 20, 1903, Gordon telegraphed Robertson (Rec. 87, fol. 142), that he would be detained in court until after April 3, and asked him, Robertson, to "notify Nitzen," this last because in his letter of March 10 Robertson had informed Gordon that it was reported that Nitzen was "starting to Washington to be presented to the President about the 20th of this month" (Rec. 171, fol. 113). Finally, on March 23, 1903, Gordon sent Robertson a telegram (Rec. 88, fol. 143) saying that he was leaving Sunday night and would reach Washington Tuesday, and asking Robertson to write to the Raleigh Hotel full information and suggestions—clearly indicating that he was not expecting Robertson to be present personally.

This telegram is peculiarly significant. As above stated, Robertson by some means induced the Court of Claims to find that he went to Washington "early in March," whereas

he is shown to have been writing from the West as lately as March 19, and he, Robertson, himself (Rec. 74, fol. 115), offered in evidence this telegram of March 23, the presumption being that he received and acted upon it. The almanac shows that March 23, 1906, fell on Friday, and that the following Tuesday, the day on which Gordon was to reach Washington, was accordingly March 27. Gordon testifies that he arrived on the night of that day (Rec. 129, fol. 224), and that the memorandum of March 28 was executed on the day of, or the day following, his arrival at Washington (*Ibid.*; Rec. 95, fol. 155).

The fact of Robertson's presence in the City of Washington at this time is also not without significance. In his testimony (Rec. 72, fol. 111), Robertson says that Gordon mentioned in a letter written to him or Gwydir "that we were seriously handicapped because we were unable to meet more closely in conference and *wished me to come to Washington*, if possible, to confer with him on the situation." This, undoubtedly, refers to Gordon's letter to Robertson of March 10, 1906 (Rec. 87, fol. 110), in which Gordon said: "It is a great pity that our consultations must be had through the very slow and unsatisfactory medium of correspondence"; but there is nothing in this letter, or in any other letter found in the record, conveying even an intimation on Gordon's part in the direction of Robertson's visiting Washington; on the contrary, in this very letter he speaks on the supposition that both Robertson and Gwydir being on the ground out West would *there* strengthen his, Gordon's, hands; enjoins on Robertson to *write*, and asks Robertson to send him complete data and his, Robertson's, suggestions—all with a view to his, Gordon's, going to Washington and being there alone.

And which of the two reached Washington first is not

clear from the record. Quite certainly Gordon reached Washington on the night of Tuesday, March 27, and Robertson, personally cross-examining Gordon, asked these questions: "Were you here several days before I was?" and "What date did you get here?" as though expecting to show that Gordon arrived first. In his letter of March 10, 1896, however (Rec. 174, fol. 313), Robertson wrote Gordon that it was reported that Nuzum was "starting to Washington to be presented to the President about the 26th of this month," and in his testimony, without giving a date (Rec. 172, fol. 111), says that he went to Washington on the same train with Nuzum "traveling together, but under no agreement, except that we were both working for the success of the Indian claims." Obviously, if this were so he was not going to Washington to defeat Nuzum's contract, about the validity of which he says that he knew nothing personally (*Ibid.*), but, almost immediately thereafter, he says that, having become aware that Butler and Vale had worked with Judge Gordon and Nuzum, he informed Gordon that in his opinion the efforts of Judge Gordon and Nuzum were strong, and "advised, if possible, a unity of action between all of the attorneys," and impressed upon Gordon "the necessity of stringing the situation up so as to present the Indian claim by a solid bunch of lawyers working for them, rather than a bunch of disputants over the matter" (Rec. 172-3, fol. 111-12) — a singular position, to say the least, for Robertson to put himself in, and no explanation of which has he vouchsafed.

Whatever may be the import of this strange development, it is undoubted that when Gordon reached Washington he was in such ignorance of the real situation as to have made it impossible for him to know by the morning after his arrival enough to canvass the matter sufficiently to come to any understanding, with either Robertson or

any one else, as to a division of fees based upon the outlook in general. In his letter of February 8, 1906, to Robertson he had written: "The truth is, I am so much in the dark as to the exact situation out there and in Washington, that I can not advise you or counsel with you intelligently" (Rec. 172, fol. 310); as already pointed out, in his letter of March 10, 1906, he was inviting assistance, data and suggestions from Robertson; and in his letter of March 10, 1906, to Gordon, Robertson cautioned him not to start a fight against the McDonald contract precipitately, but to size the situation up carefully, and if Robertson and Gordon's interest in the premises were not to be protected, then to oppose those claiming under the McDonald contract (Rec. 174, fol. 314). And when Gordon finally reached Washington he did not understand the condition with regard to the bill, which was then in conference, although after his arrival, and after ascertaining the exact status of affairs—meaning, of course, after the lapse of the time necessary to enable him to ascertain the status—he, of course, knew that no new contract could be secured (Rec. 129, fols. 223-4); which last statement is scarcely candidly characterized in the brief for Robertson (page 24), as an "admission" by Gordon that at the time of making the memorandum of March 28, 1906, he, Gordon, knew that that memorandum could not have contemplated the securing of a new contract on the part of Robertson and himself.

It is thus a demonstration that, as Gordon has testified, when uniting in the memorandum in question he had, and could have had in mind, only the matter of a division of compensation between himself and Robertson on the hypothesis of a new contract or an extension of the old.

While, as above seen, the language of the memorandum of March 28, 1906, does not make mention of either a new

contract with the Indians or an extension of the old, the provisions thereby made respecting the division of the fees between Robertson and Gordon including the provision that Gwydir was to be compensated out of Robertson's share, and the provision that the fees to be divided were the net fees coming to Gordon after settling with other attorneys under other contracts, are in exact accord with what Gordon wrote Gwydir December 18, 1905 (Rec. 161, fol. 287), which was specifically conditioned upon the securing of a new contract as follows:

"In regard to protecting the interests of yourself and Mr. Robertson, you will doubtless remember that I wrote you when we began this new deal that I would not only be willing to make the interest of yourself and associates the same as we did when Maish and I first made our trade with you, but would be willing to increase the interest to (25%) twenty-five per cent, so as to give you a big margin for securing all the help you needed. In other words, to you and to those who co-operate with you *in securing the contract* we will set aside (25%) twenty-five per cent, twenty-five per cent (25%) to be set aside for my interest and the remaining (50%) fifty per cent to (be) reserved for securing the best and most influential attorneys in Washington to press the claim for us, before Congress and the Court of Claims.

"My idea is that you and Mr. Robertson shall use your own judgment as to the distribution of the twenty-five per cent allotted to you for work at that end of the line."

Very clearly, when Gordon subscribed the memorandum of March 28, 1906, he did so in the conviction and with the intention that he was only putting into formal shape that which he already understood to be the arrangement and agreement between Robertson and himself.

*2. Action of the Parties after March 28, 1906.*

It is manifest that in making the memorandum of March 28, 1906, Robertson and Gordon were undertaking to express an understanding between themselves only, and without reference to the claims of any others to a right to participate in the contemplated fees to come from the Indians, except as respected Gwydir, who was not only obligated to aid Robertson in securing the new contract, but also had rendered services in the procurement of the Maish-Gordon contract, and such attorneys as Gordon had theretofore interested in the matter, which excluded those claiming under the McDonald contract; in other words, Robertson and Gordon were excluding the latter wholly from consideration.

It is also manifest that the memorandum left entirely open the questions how much Gwydir might be entitled to, and how much the attorneys interested by Gordon, as stated. On exactly what day does not appear, but evidently at some time between March 28 and April 3, the question of allotting compensation to the various persons concerned arose, Butler and Vale, Gordon and Robertson stating their several claims to consideration and failing to come to an agreement. The expedient was then hit upon of an agreement to submit to the conference committee, before which the bill was pending, the claim of the attorneys on the basis of *quantum meruit* (Rec. 73, fol. 113; Rec. 124-5). This agreement was in the following terms:

"The undersigned hereby stipulate and agree that their respective claims for services rendered the Colville Indians be submitted to the Conference Committee of the Senate and House of Representatives on a *quantum meruit*, and agree to stand to and abide by any award which shall be made in the premises, and in

case no award shall be made the rights of the said parties shall remain unaffected.

"This the 3d day of April, 1906,

"HUGH H. GORDON,

"*For Himself and Associates.*

"MARION BUTLER,

"*For Himself and Associates.*

"F. C. ROBERTSON,

"*BUTLER & VALE,*

"All services subsequent to Formation of Copartnership."

As is seen, the agreement was silent as to both Gwydir and those claiming under the McDonald contract, except that Gordon signed "for himself and associates," which would include Gwydir, leaving Robertson acquit of any obligation to the latter—the first evidence of a supersession of the memorandum of March 28.

This agreement of April 3 having been made, the parties thereto, or at least some of them, consulted members of the conference committee and talked on the subject with, among others, Senators Dubois, Clapp, and McCumber with reference to a hearing on the claims of the different attorneys (Rec. 73-4; fols. 113-114; 125; fols. 215-216), with the result that there arose a doubt as to whether the Committee would directly assume the task of adjudicating the conflicting claims of the attorneys (*Ibid*), and certain members of the committee had in fact declared that unless the attorneys could agree as to the distribution of the fee, no fee would be appropriated (*Ibid*; and Rec. 117-118). The result was the Raleigh agreement, so called, in the following terms (Rec. 120-1):

"Washington, D. C., April 12, 1906.

"This agreement made and entered into between Marion Butler on his own behalf and on behalf of

his associate counsel, R. W. Nuzum, on his behalf and on behalf of his associates, and Hugh Gordon and F. C. Robertson, Witnesseth:

"That Whereas, each of said parties mentioned herein have rendered services as attorneys for the Colville Indians and claim the right to participate in any appropriation made to pay said attorneys' fees;

"Now, therefore, Provided the sum of one hundred and fifty thousand (\$150,000) dollars is allowed for the payment of attorneys representing said tribe of Indians then of the said sum eighteen thousand seven hundred and fifty (\$18,750) dollars is to be paid to the said R. W. Nuzum for himself and associates and nine thousand three hundred and seventy-five (\$9,375) dollars to F. C. Robertson; the remainder of said sum to be distributed by the said Marion Butler as he elects. Should the appropriation be less, then this agreement is to be the basis of the distribution, sharing pro rata in such diminished sum, as the percentage is thereby diminished.

"In witness whereof we have hereunto set our hands and seals at the City of Washington, the day and date above written.

"R. W. NUZUM. (Seal.)

"HUGH H. GORDON. (Seal.)

"F. C. ROBERTSON. (Seal.)

"MARION BUTLER. (Seal.)"

Gordon correctly describes this agreement as a compromise involving a concession by him—as it manifestly did, seeing that it recognized Nuzum and his associates under the unapproved and invalid McDonald contract—and he correctly says that it "contemplated a direct appropriation by Congress": adding that his "concession was made under the statement made to me by Butler, or Butler and Vale, that unless all parties agreed upon a division of the fee no appropriation would be made, and I yielded in order to save what looked like a desperate situation" (Rec., 117,

fol. 200-1); adding that his reason for making the concession was the representation made to him that the trouble or differences among the attorneys about fees alone held up the appropriation; that if the fees were separately arranged so that Congress would be freed from that question, the appropriation would be made, and that members of the committee had stated that no appropriation would be made unless counsel agreed (Rec., 118, fol. 202-3); further adding that he had "never, up to the contemplated concession and compromise, recognized the right of Mr. Robertson to any interest in that fee" (meaning fee to be paid by the Indians), "except under the condition precedent to his securing the new contract" (Rec. 119, fol. 205); and explaining what he meant by compromise and concession, as follows (Rec. 122, fol. 209):

"He (Robertson) was claiming to have an interest in the Maish-Gordon contract, and my position was that he had no interest, except such as was contingent upon his securing a new contract; and Butler's position was contested, because he was claiming more than I believe he was entitled to legitimately; and the concession made by me to both, as set forth in the so-called Raleigh agreement, was under the distinct stipulation that it would secure a direct appropriation of the fee and that refusal to do so would mean the loss of the entire fee."

Very clearly, by this time the agreement between Robertson and Gordon, evidenced by the memorandum of March 28, 1906, had become wholly superseded and passed out of consideration; and instead of acting in exact accordance with either the agreement of April 3, or the Raleigh agreement of April 12, 1906, Congress dealt with the subject of the fees of the attorneys by inserting in the act making the appropriation to pay the claims of the Indians, the following (Rec., 5-6):

"\* \* \* jurisdiction is hereby conferred upon the Court of Claims to hear, determine and render final judgment in the name of Butler and Vale (Marion Butler and Josiah M. Vale), attorneys and counsellors-at-law, of the City of Washington, District of Columbia, for the amount of compensation which shall be paid to the attorneys who have performed services as counsel on behalf of said Indians in the prosecution of the claim of said Indians for payment for said land, and in determining the amount of compensation for such services the Court may consider all contracts or agreements heretofore entered into by said Indians with attorneys who have represented them in the prosecution of said claim, and also all services rendered by said attorneys for said Indians in the matter of said claim. Petition hereunder shall be filed in said Court by the said attorneys (Butler and Vale), within thirty days from the passage of this Act, and the Attorney-general shall appear on behalf of the defendants, and said cause shall be given preference for immediate hearing in said Court, and the Secretary of the Treasury is hereby authorized and directed to pay the sum of money so awarded by said Court to the said attorneys (Butler and Vale), upon the rendition of final judgment, out of the said sum herein set apart or appropriated for the benefit of said Indians, and payment of said judgment shall be in full compensation to all attorneys who have rendered service to said Indians in the matter of their said claim, the same to be apportioned among said attorneys by said Butler and Vale as agreed among themselves: *Provided*, That before any money is paid to any attorney having an agreement with Butler and Vale as to the distribution of said fees, each of the same shall execute and deliver to the Secretary of the Interior a satisfaction and discharge of all claims and demands for services rendered said Indians in the matter of their said claim."

This provision, while, as stated, not in exact accordance with either the agreement of April 3, 1906, or the Raleigh

agreement, yet approaches a recognition of the latter, in that, first, it provided for consideration of *all* contracts or agreements entered into by the Indians with attorneys, and *all* services rendered the Indians by attorneys in the matter of their claim, and, second, it provided that the amount of compensation awarded should be apportioned among the attorneys by "Butler and Vale as agreed among themselves." When, however, the matter reached the Court of Claims, that Court ignored the Raleigh agreement, or any other agreement among the attorneys, and treated the case as though submitted for determination on the basis of *quantum meruit*, holding that portion of the jurisdictional enactment referring to an arrangement or agreement among the lawyers as directory only, and pointing out that certain intervenors before the court had expressly disclaimed any valid agreement respecting the distribution of any sum recoverable under the provision, and that as to the assumed agreement among the attorneys, the parties thereto and the terms thereof were never revealed to certain of the intervenors until the production of the instrument in court at the trial (Rec. 215-217); and the Court of Claims accordingly held that, notwithstanding the literalness of its language, the Act of Congress referring the matter to the court, when properly construed, was, in effect, a reference for the ascertainment of the compensation properly payable to the attorneys entitled upon the principle of *quantum meruit*. The court accordingly excluded from any participation in the compensation not only Gwydir, but also all who claimed under the McDonald contract, but included Robertson, upon the finding, shown by the record herein to be contrary to the fact, that Robertson had become interested in the matter of the claim of the Indians through the solicitation of Gordon under the Maish-Gordon contract, when, in fact, he had

become interested only for the purpose of getting an extension of that contract or the execution of a new one, which purpose wholly failed of accomplishment.

Robertson now claims that, though a beneficiary by the judgment of the Court of Claims, he was really not a party before the Court and therefore is not bound by its action in the premises. This claim does not bear the test of examination. When the case was before that court, and on July 25, 1906, Butler and Vale wrote Robertson as follows (Rec. 176, fol. 320) :

"We have heretofore written you requesting a statement of the services which you have rendered to the Colville Indians and forwarded you a copy of the petition filed with the court. \* \* \*

"The law sending the case to the court requires that services shall be proven, and that in payment the kind of services shall be considered, so that it is vital, if you have rendered any services to the Indians, that it shall be affirmatively shown, and before we undertake to take testimony it is of course essential that we shall have before us a complete view of the case in this regard."

Replying, under date of August 1, 1906, Robertson wrote Butler and Vale as follows (Rec. 177-8) :

"I am in receipt of your favor of July 25, and in response thereto would say that I have received a copy of the bill filed by you in the Court of Claims. In regard to services that I rendered, I would beg to say that I have a written contract with Mr. Hugh Gordon for one-half of the moneys recovered either in his name or mine in this controversy. I also have a contract with you that of the money received I shall receive something less than ten thousand dollars. I prepared a

complete brief to be filed, but Mr. Butler was insistent that this was not necessary, as he had covered in his opinion the facts in the case. \* \* \* In fact, I was induced to act under your direction in this matter by Senator Dubois. I did see a number of individual Congressmen and Senators, read a brief to at least two of them, and was prepared at any time to go before this committee *un'il our complete arrangement was made.*

"Now under this contract both yourselves and Gordon are obligated to me for my share of the money received, whether or not services are proved by me. \* \* \* I entered into the contract, and from that time on acted under the idea that the business in hand should be confided solely to Mr. Butler. I would therefore at this time like to know what you want me to do to assist you; whether you fully coincide with my statement that no matter whether this money is allowed individually to Butler and Vale or others, I am entitled to my share *under the agreement made between Butler individually, Butler and Vale, Hugh Gordon and R. W. Nuzum.* \* \* \*."

Again in his letter of October 3, 1906 (Rec. 99-100, fols. 167-8), Robertson wrote as follows:

"I understand that our contract was fully executed by Butler and Vale, and therefore I can not see how we would be benefited by doing anything except aiding them in this matter, as they must protect us under the written agreement. \* \* \* I suggest that owing to the great expense of going to Washington and protecting our interest, and owing to the positive admission of Mr. Vale that we are protected by the contract with them, we had best leave this matter entirely in their hands, and be largely governed by their advice in the premises."

Plainly, we have here a distinct recognition by Robertson

that the agreement between him and Gordon, of March 28, 1906, had given place to the Raleigh agreement of April 12, 1906, that he was relying and depending upon the latter, and that under it he looked as much to Butler and Vale as he did to Gordon for his "share of the money received." Under the circumstances, it is difficult to understand why, as hereinbefore indicated, Robertson should now be treating Butler and Vale as eliminated from this cause, instead of pursuing them, as well as Gordon, for what he claims.

Within two months thereafter, namely, on September 27, 1906, Robertson testified as a witness in the case before the Court of Claims, when under cross-examination by Assistant United States Attorney-General Anderson, as follows (Rec. 78-9):

Question. Now, Mr. Robertson, you say you became interested in this case under the Maish-Gordon contract. Now, will you please state as nearly as possible the exact time when you became so interested and whether you had a contract with them, and if so, will you please file the contract as an exhibit to your testimony?

Answer. Yes, sir; I will try. That was, I think it was, in the latter part of 1893. I did not have a contract.

Question. In the latter part of 1893?

Answer. 1903. I did not have a contract, but simply looked for a fair division. I was informed by Mr. Gordon that my services would be compensated by Mr. Hugh H. Gordon, who was the living member of the Maish-Gordon contract, equally with him.

Question. Mr. Maish died sometime before that?

Answer. Sometime before that. My view of the matter was that if I rendered valuable services and rendered them, I would be entitled, irrespective of that or any other contract, to be paid compensation, because I had to look to the equitable side of it, because Congress could or could not give me money, if they saw fit.

Question. Then your employment by Mr. Gordon was entirely verbal?

Answer. Yes, sir.

Question. Nothing documentary?

Answer. No, sir; I had a letter from Mr. Gordon, and by the way he sent me the original contract, so that I could see the terms of the contract. I have the contract here, which I offer.

This testimony is susceptible of but one explanation consistent with Robertson's truthfulness, namely, that the agreement of March 28, 1906, between him and Gordon had become so effectively superseded that it had actually passed out of Robertson's recollection: No other explanation of it is possible, unless it be that Robertson wilfully testified falsely and with the purpose of concealing from the Court of Claims the fact that he had an agreement with Gordon for an equal division, in the belief that if he revealed the existence of the agreement it might tend to reduce the awards by the Court to him and Gordon, respectively. And this latter explanation, it is safe to assume, is not offered in Robertson's behalf.

And when testifying herein, Robertson produced and offered in evidence a letter (Exh. A-3, Rec. 76, fol. 118, 175; fol. 316) addressed by him to Assistant United States Attorney-General Anderson, under date of April 15, 1907, and sent to his, Robertson's, attorney for use in his discretion (Rec., 78, fol. 122), in which he stated as follows:

"To-day I for the first time saw a copy of Mr. Hugh Gordon's testimony. It does not seem clear that he recognizes me except as having become associated in this case with him after Nuzum arrived in Washington. \* \* \* I went before Mr. Avery today and asked him to let me identify the receipt for money sent to Gordon by myself and the contract signed in Washington by Mr. Gordon. I request you to permit this deposition to be filed with your consent

as a part of the record. For that reason I transmit it directly to you. It is of great importance to me that this contract be admitted in evidence, because it will prevent the necessity of a dispute, probably, owing to the fact that I did not put them in as a part of my direct testimony. I did not believe they were material, thinking Mr. Gordon would make plain my testimony. I wish you to see that this is filed, *for really I stand in the position of an intervenor* and have the independent right to protect my own rights in connection with the co-counsel in the case."

This communication establishes two facts, namely, first, that Robertson recognized his true position in the Court of Claims as that of an intervenor, and, second, that he had, by the date of the communication, some seven months after he had given his deposition, recalled the agreement of March 28, 1906, and had determined to set it up, notwithstanding his previous position that his claim in the premises rested upon the Raleigh agreement of April 12, 1906; and his statement in this communication that he omitted to put the March agreement in evidence because he did not think it was material, but thought that Gordon would make plain his, Robertson's, testimony, cannot be accepted, for the simple reason that in giving his deposition, in September, 1906, he stated unequivocally that he had no agreement; wherefore, his two statements, namely, first, that he had no agreement, and second, that he did not produce the agreement which he had because he did not consider it material, put him in a dilemma from which it is not the part of the counsel for Gordon to undertake to relieve him.

And in amazing supplement to the inextricable confusion in which he has put himself in the premises, when testifying in this cause, about the March agreement with Gordon, Robertson says (Rec., 77, fol. 120):

"I never had any agreement with Mr. Hugh Gordon at any time modifying or changing the written contract. Our agreement was then and there crystallized into this contract after considerable discussion, *and I have claimed under it ever since.*"

And notwithstanding his previous letter to Butler and Vale, of August 1, 1906 (Rec., 177-8), already noticed, in which he said that he held both Butler and Vale and Gordon obligated to him under the Raleigh agreement made by him with Butler, individually, Butler and Vale, Gordon and *Nuzum*, yet in his deposition of April 15, 1907, accompanying his letter of that date to Assistant United States Attorney-General Anderson, he said, outright: "I never had *any* agreement with Messrs. *Nuzum*, Judge Gordon, McDonald, *or* Anderson, or claimed any interest under their contract" (Rec., 85, fol. 136).

Viewing the conduct and attitudes of Robertson throughout, it plainly appears that, at the time of the making of the Raleigh agreement of April 12, 1906, he clearly understood and believed that that agreement had superseded both of the prior agreements of March 28 and April 3, 1906; so much so that when testifying in the suit in the Court of Claims he had cleanly forgot the March agreement; that he read and understood the act referring the question of compensation to the Court of Claims to mean that that compensation was to be determined in accordance with the Raleigh agreement, and upon such his understanding he stood, both with Butler and Vale and before that Court, until he became sensible of the fact that the suit was being proceeded with on the *quantum meruit* assumption, when he recalled the March agreement and set it up in contradiction of his testimony that he had no agreement with Gordon; that the necessity under which this change of attitude placed him led

him to say that he did not produce the agreement which he actually had with Gordon, because he thought it immaterial; and that by way of final endeavor in the suit in the Court of Claims he went to the extreme of denying that he ever had any agreement with Nuzum, notwithstanding that the Raleigh agreement was such; and that in this cause he asserts that the definite and controlling agreement to which he and Gordon were parties was the March agreement, and that he has claimed under that agreement ever since; and notwithstanding that he gave testimony before the Court of Claims as to his services to the Indians, upon which testimony the Court made a finding in his favor, and also insisted to the Government's representative in that case that his position was really that of an intervenor, he yet testifies in this cause (Rec., 77, fol. 121) that he never presented any of his claims to the Court of Claims.

### *3. Conclusion.*

Consideration of the entire record in the case, including the history of the relations of Robertson and Gordon, the successive agreements of March 28, April 3, and April 12, 1906, the language of the Act conferring jurisdiction upon the Court of Claims in respect of compensation to the attorneys for the Indians, the construction of that Act by the Court of Claims, the conduct of the parties in the suit in that Court, and the testimony of Robertson both in that suit and in this cause, and his correspondence with Butler and Vale, the titular claimants in the Court of Claims, leads irresistibly to the conclusion that the Court of Appeals clearly, correctly, and exactly solved the matter in issue, as follows (Rec. 195-6):

"The contract of March 28th, 1906, seems broad enough in its terms to apply to fees that might be re-

ceived by Gordon under direct appropriation or otherwise, on account of his Indian contract, and would, we think, warrant a recovery by Robertson, if it were not for the subsequent contracts and proceedings. When the new agreements of April 3d, and April 12th, 1906, before stated, were made, two situations were contemplated. The first was that the matter of the award might be considered by the conference committee and made on a *quantum meruit* basis, in which event they were to stand, and abide by any award so made. Hoping by joining with Nuzum, who claimed under some other contract, to obtain an appropriation of the entire sum of \$150,000.00, they entered into the agreement providing for a different distribution, in which Gordon and Robertson were separately provided for. These new agreements took the place of all former ones between the parties; one to control in one probable event of Congressional action, the other to control in another. The result provided for in the agreement of April 3d occurred, but not exactly as anticipated.

"The *quantum meruit* basis was adopted by Congress, but instead of determining the several amounts by its own action, it referred that determination to the Court of Claims. It is not necessary to decide whether the contract of April 3d embraced any other determination on the basis of *quantum meruit*, than that expected to be made by Congress directly, and would not apply to its determination by reference to the Court of Claims.

"Whatever view may be taken of this, certainly those who appeared in that Court and presented their claims for adjudication and received separate and distinct awards therefor, are bound by their action and the judgment rendered thereon.

"The proceedings on the petition of Butler and Vale were informal, and there was no occasion that they should be otherwise. Although Robertson did not appear by formal pleadings, it is clear that he considered himself a party, testified in support of his claims, and

anticipated an award therefor. He did not undertake to magnify the services of Gordon in the expectation of subsequently sharing with him, but magnified his own by giving them an earlier date than he was entitled to under his original contract with Gordon. His interests were apparently represented by Butler and Vale. As a separate award was made to him and to Gordon on the *quantum meruit* basis, we think that his conduct, though lacking a formal pleading, was sufficient to bind him by the judgment rendered, and that he is estopped to contradict that judgment."

Respectfully submitted,

HENRY E. DAVIS,

*For Gordon, Appellee.*

U. S. DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA  
NOV 15 1912  
JAMES H. McKEEVEY

IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1912.

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No. 56.

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FREDERICK C. ROBERTSON, APPELLANT,

vs.

HUGH H. GORDON, MARION BUTLER, AND JOSIAH  
M. VALE, INDIVIDUALLY AND AS PARTNERS, TRADING  
UNDER THE FIRM NAME AND STYLE OF BUTLER & VALE,  
APPELLEES.

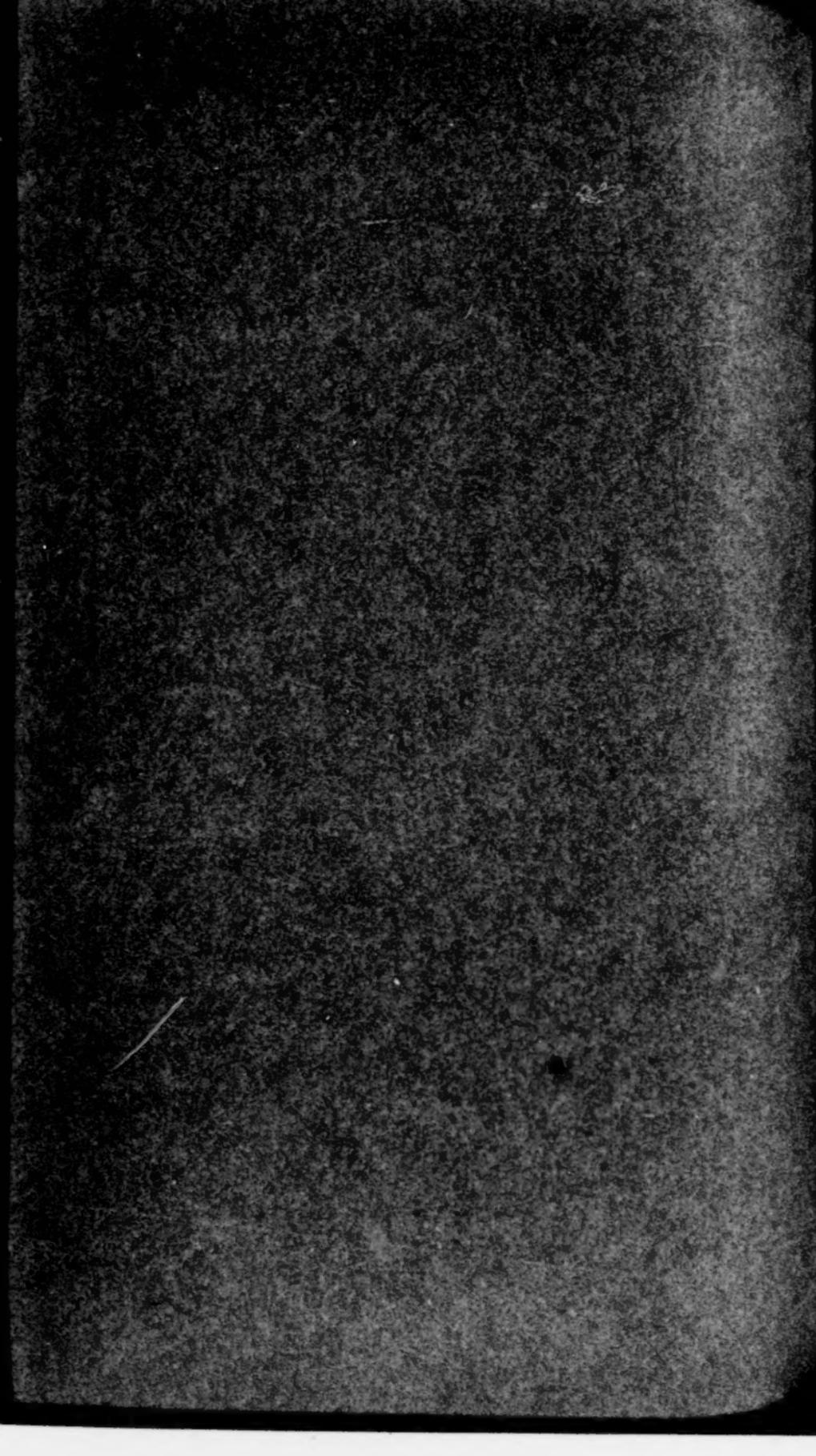
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REPLY BRIEF FOR APPELLANT.

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GEORGE H. PATRICK,  
GEORGE H. LAMAR,

*Counsel for Appellant.*



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**REPLY BRIEF FOR APPELLANT.**

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The original brief of appellant was prepared upon the idea that under the rules of this court it is the duty of counsel to present as clearly as may be the questions of fact and law involved, supporting the same with fair and proper argument and eliminating purely scandalous matter.

Had the brief of appellee been framed in harmony with this idea, there would probably have been no need for reply, as his brief contains no straightforward or comprehensive attack on any proposition presented by appellant. On the contrary, it constitutes an apparently studied effort to be-

cloud the issues, even to the extent of bordering upon the scandalous.

While it may now be appropriate to discuss the credibility of the appellee as a witness, and while the unjust effort to reflect upon the integrity of the appellant is naturally resented, the attention of the court, in the outset of the argument, is respectfully called to the fact that there is no point in this case which depends for its solution in favor of appellant upon his credibility or alleged lack of credibility, the material parts of his oral testimony standing as they do without denial, but with virtual admission of the appellee. Therefore the whole scurrilous attack is purely gratuitous and made in violation of the spirit, if not the letter, of the rules of this court.

To clarify the issues this reply brief is respectfully submitted.

## I.

### **Equitable Assignments.**

The brief of appellee, under "statement of the case," purports to present (pp. 3, 7) "the essential and material allegations" of the bill and answer, but wholly omits from the review of the former any mention of the equitable assignment of appellee to appellant for \$150.00, set forth in the bill (R. 4), and from the latter the anomalous and untenable averment on which the same was originally sought to be avoided.

For the reasons set forth in our original brief (pp. 98-101), it is therefore respectfully suggested that the decree of the court below should at least be reversed to the extent of this item of claim, and the costs of the appellate proceeding should, in any event, be placed on appellee.

## II.

**Contract of March 28, 1906.**

The brief of appellee is apparently confined to a defense of the item of claim of appellant based upon this contract.

On pages 42 and 43 of his brief appellee, among other things, says:

"Considering the entire record \* \* \* leads irresistibly to the conclusion that the Court of Appeals, *clearly, correctly, and exactly solved the matter in issue, as follows*" (R., 195-6);

"The contract of March 28, 1906, seems *broad enough in its terms to apply to fees that might be received by Gordon under direct appropriation or otherwise, on account of his Indian contract, and would, we think, warrant a recovery by Robertson, if it were not for the subsequent contracts and proceedings,*" etc. (Italics supplied.)

Here is a clear admission of what cannot be successfully denied, that the scope of this written contract was sufficiently broad to include the funds in the hands of the receivers of the lower court and also that said instrument was not successfully attacked by any evidences arising anterior to or at the time of the execution of this contract on March 28, 1906.

In the outset, let it be remembered that this written contract was set out in full in the bill (R., 5) and its execution was admitted in the amended answer (R., 39).

No effort was made, by cross-bill or otherwise, to reform or avoid this instrument on the ground of fraud or mistake; and there was no written evidence averred or introduced showing or tending to show either fraud or mistake in the execution of the instrument.

Under these circumstances, even if the first defense set up in the answer, namely, that the contract was predicated wholly upon the condition that appellant should secure a

new contract from the Indians, had been made by cross-bill averring an oral understanding contrary to the terms of the instrument itself, such cross-bill would have been subject to dismissal on demurrer.

Brown *vs.* Slee, 103 U. S., 828, 834, 837-8.

In this case, by cross-bill the defendant averred (p. 834):

"that said claim against Baldwin was spoken of, and was the subject of conversation between the parties at the time of the purchase, that the same was not settled or adjusted or understood to be embraced in the terms of the settlement for the reason, among others, of the hope that the same might be realized in whole or in part from said Baldwin."

To the cross-bill was exhibited the written contract of purchase, the legal effect of which, as construed by the court, was contrary to this averment based on oral testimony of what occurred at the time of the execution of the instrument. On demurrer, the cross-bill was dismissed, and the decree of dismissal was presented for review in this court on appeal in the case as cited. In disposing of the matter, this court, speaking through Chief Justice Waite (p. 837), said:

"The averments of Brown as to the obligation of the estate are contradicted by the terms of the written instrument to which he referred, and on which the rights of the parties depend. *There is no allegation of fraud or mistake in reducing the contract to writing.* It follows that the demurrer to the cross-bill was properly sustained." (Italics supplied.)

In view of the admissions quoted from the brief of appellee, the broad terms of the contract itself, expressly made to apply to any possible allowance, "*under the Maish-Gordon contract with said tribe or on any theory whatsoever.*" we submit that the first proposition contained in appellee's brief (p. 10), "that the agreement \* \* \* was made solely in contemplation of a new contract with the Indians,"

must fall for lack of pleading to support it. Thus the 20 pages of the brief of appellee (pp. 10-29, both inclusive) devoted to a labored effort to insinuate into the record the idea of mistake, if not of fraud, in the execution of this written contract, even if devoid of the many inaccuracies and erroneous assertions, which characterize the brief from beginning to end, is of no avail in limiting the scope or avoiding the legal effect of the contract as it subsisted on March 28, 1906.

It is true that the anterior correspondence was reviewed in the brief of appellant for the purpose, among other things, of showing considerations passing between the parties prior to the date of the contract, and the 20 pages of appellee mentioned are devoted in part to an effort to minimize these considerations, but the validity and binding character of the contract is not dependent upon the truth or falsity of the construction of this correspondence by either party.

The mutual considerations appearing upon the face of the contract were sufficient to support and render it valid and binding upon appellee and appellant alike, and there is no escape from its acceptance as a valid contract.

### III.

#### **"Subsequent Contracts and Proceedings."**

The second ground of defense to this contract, as set up in the brief of appellee (p. 10) is:

"Second, the agreement was superseded and supplanted by what followed," meaning presumably what is expressed by the Court of Appeals whose position is adopted by appellee as "subsequent contracts and proceedings."

(The fallacy of the position of the Court of Appeals in this regard is pointed out more fully on pages 56 to 94 of appellant's original brief.)

This proposition is treated by appellee in his brief under the head of "2 Action of the parties after March 28, 1906," pages 30 to 42, both inclusive.

*No Pleading to Support Defenses.*

It will be observed that the sole ground of defense, set up in the amended answer, on which this proposition could be predicated was that of *res adjudicata*.

It will also be observed that there is no effort in the argument of this cause by appellee to show that the proceedings before the Court of Claims on which the defense of *res adjudicata* was predicated were had "by a court of competent jurisdiction upon the same subject-matter \* \* \* and for the same purpose," points essential to sustain the plea.

*Aspeden vs. Nixon*, 4 How., 467, 497-8.

(These points are more particularly discussed, pp. 72 to 82 of the original brief of appellant.)

On the contrary, the position taken by appellee in the lower court to the effect that appellant "submitted his claim to one-half of the compensation to be awarded to this defendant" (R., 41), has been practically abandoned and there has been substituted in this court for the first time a labored effort to show that appellant had either forgotten the existence of his contract of March 28, 1906, or had deliberately concealed its existence from the eyes of the Court of Claims, a position diametrically opposed to that set up in his amended answer as the principal ground for appellee's plea of *res adjudicata*.

It will also be observed from the statement of the second proposition by appellee, page 10 of his brief, it is not contended that the contract of March 28, 1906, was rescinded or the limited copartnership thereby created was dissolved, but that the same was "superseded and supplemented by what followed."

Neither is it contended, in the "statement of the case" or

otherwise, that appellee pleaded as a defense to the contract in the court below "the subsequent contracts" of April 3 and 12, 1906, or either of them.

On the contrary, the record shows that neither of said paper-writings were set up in the pleadings or introduced in evidence by appellee, and the one of April 12, 1906, was introduced over the objections of counsel for appellee (R., 120-1).

There is also contained in the brief of appellee the veiled suggestion, *in this court for the first time* (pp. 937-8), that Butler and Vale are liable to appellant under the Raleigh agreement of April 12, 1906, out of the funds awarded to them by the Court of Claims, and inferentially to the relief of appellee *pro tanto*. Attention is called to the fact that no such defense was set up by appellee in the lower court. On the contrary, his answer exhibited (R., 202-224) the findings of fact, conclusions of law and opinion of the Court of Claims under which appellee successfully prevented an award of the whole fund to Butler and Vale; the record shows that the claim of Butler and Vale, made in the lower court for the whole fund by intervening petition in the nature of a cross-bill (R., 31-37), was resisted by appellee as well as appellant, and that their demurrers were sustained and the cross-bill dismissed (R., 51) in the lower court at the instance of appellee as well as appellant. The attitude and conduct of appellee, as the limited copartner of appellant, operating adverse to such relief by appellant against Butler and Vale, is more particularly stated in the original brief of appellant (pp. 29-36, 83-85, 85-91).

#### *Authorities on Modification and Reformation.*

In the light of the foregoing observations, before entering into a more detailed discussion of appellee's treatment of this branch of the argument, it is deemed not inappropriate to call attention to certain decisions of this and other courts having more or less direct bearing in the premises.

The discussion must be begun, however, with the acceptance of the fact that on March 28, 1906, there existed a valid contract between appellant and appellee, whose scope was sufficiently broad, as found by the Court of Appeals and as admitted by appellee, to embrace the funds now in the hands of the receivers, subject only to alleged modification by "the subsequent contracts and proceedings."

If, from the four corners of the instrument, this court shall construe the contract of March 28, 1906, to have created or evidenced a limited copartnership, then, irrespective of the services rendered thereunder, it remains as binding upon the parties in the absence of dissolution of such limited copartnership.

*Consaul, adm'r, vs. Cummings, adm'r*, 222 U. S., 273.

In this case Mr. Justice Lamar, speaking for this court, said:

"Here the agreement related solely to litigation in which compensation was for success and not for the value of the services rendered. Such payment was to be *in solido* and the partners agreed that the fees should be divided *in solido*."

If the contract in the case at bar should be found to lack any element of a limited copartnership it was nevertheless a contract of the same general character, and binding upon the parties until rescinded or superseded by a new contract.

In the case of *Uhliz vs. Barnum*, 43d Neb., 584, it was held (syllabus) that:

"A new contract with reference to the subject-matter of a former one does not supersede the former and destroy its obligations, except in so far as the new one is inconsistent therewith, when it is evident from inspection of the contract and from an examination of the circumstances that the parties did not intend the new contract to supersede the old one, but intended it as supplementary thereto."

In the case of *McDaniel vs. Robinson* (26 Vermont, 317, 340-1) the Supreme Court of Vermont (syllabus) held:

"In the present case the plaintiff delivered a sum of money to the defendant (an inn-keeper) to keep, and after he had so delivered the money, and defendant had accepted it, the plaintiff requested defendant to take the money to one Dr. Swift, to be kept over night, and the defendant agreed to do so; it was held that this new contract was not inconsistent with the continuance of the former one, and only provided a new mode of discharging the former one, and that it produced *no effect upon it unless or until performed.*"

The same principle is recognized in numberless authorities.

"To make a negotiation for the modification of a contract effectual, it must appear that it was the intention of the party proposing it wholly to abandon the original contract."

En. U. S. Sup. Ct. Rep'ts, vol. IV, p. 577,  
citing—

*Utley vs. Donaldson*, 94 U. S., 29, 49.

*Murray vs. Harway*, 56 N. Y., 347.

*Robinson vs. Page*, 3 Russ., 122.

In the case of *Utley vs. Donaldson* (*supra*) Mr. Justice Swayne, in delivering the opinion of this court (p. 49), said:

"To constitute the abandonment of a contract, the act must be mutual."

*Robinson vs. Page*, 3 Russ., 122.

"It has been held that, to make a negotiation for the modification of a contract effectual, *it must appear that it was the intention of the party proposing it wholly to abandon the original contract, if the modifications proposed were not assented to.*" *Murray vs. Harway*, 56 N. Y., 347; *Robinson vs. Page* (*supra*).

"A waiver of a stipulation in an agreement, to be effectual must be made intentionally, and with

knowledge of the circumstances.' Darnley *vs.* The Proprietors, etc. (*supra*); How, et al., *vs.* Carpenter, 2nd Md., 259." (Italics supplied.)

On page 48 of the same opinion, Mr. Justice Swayne said:

"It is essential to the validity of a contract that the parties sets up an arrangement of a different subject-matter in the same sense. They must have contracted *ad idem* Hazzard *vs.* N. E. M. Ins. Co., 1 Sumn., 218.

"Where a written agreement exists, and one of the parties sets up an arrangement of a different nature, alleging conduct on the other side amounting to a substitution of this arrangement for the written agreement, *he must clearly show, not merely his own understanding as to the new terms of arrangement, but that the other party had the same understanding.*" Darnley *vs.* The Proprietors, &c., 2 Law Rep. H. L., 43, 60." (Italics supplied.)

In United States Coal Company *vs.* Pinkerton *et al.*, 169 Fed., 536, 542, Mr. Justice Lurton, in rendering the opinion of the Circuit Court of Appeals for the Sixth Circuit, said:

"A meeting of minds to change or modify a contract or introduce a new term is as essential as it is to the completion of the original agreement. It is not enough to show that one party in good faith understood that a different arrangement was made from that which by implication of fact and law existed. It must be shown that the other party assented to the same subject-matter. As there can be no contract without the assent of both parties, so there can be no modification or substitution of a new arrangement for the original without such mutuality of assent. Utley *vs.* Donaldson, 94 U. S., 29, 45, 47, 49; 24 L. Ed., 54; Middleberges *vs.* Baldwin, 2 Hall, 196; Darnley *vs.* The Proprietors, 2 L. R. H. L., 43; 60 N. G. S. C.; Burton *vs.* Rosemary Mfg. Co., 132 N. C., 17; 43 S. E., 480; Rissell *vs.* Clough, 71 N. H., 177; 51 Atl., 632; 93 A. M. St. Repts., 506; Turner *vs.* Webster, 34 Kans., 38; 36 A. M. Rep., 251."

In the case of Allas Reduction Company *et al. vs.* New Zealand Insurance Company, 138 Fed., 497, Mr. Justice Van Devanter, in delivering the opinion of the Circuit Court of Appeals of the Eighth Circuit (p. 513) said:

"In Utley *vs.* Donaldson, 94 U. S., 46; 24 L. Ed., 54, the Supreme Court approved the following from the case last mentioned (*Hoffman vs. Etna Ins. Co.*, 32 N. Y., 504, 433; 88 Amer. Dec., 337):

"'Every intendment is to be made against the construction of a contract under which it would operate as a snare.'"

#### *Substantial Performance.*

In the case of Spaulding *vs.* Mason, 161 U. S., 375, in which the opinion of this court was rendered by the present Chief Justice:

"A contract was made between M. and S. by which S. agreed to give M. an interest in certain fees for collecting a large number of claims which he believed would be due from the Government to postmasters and late postmasters upon a readjustment of salaries under the provisions of an act approved June 12, 1866. The consideration for the contract was money furnished by M. for the prosecution of said claim and to urge the passage of bills then pending in Congress looking to their settlement. The bill alluded to failed of passage but one was passed later which was practically identical to one of them and under which the claims were paid. It was held that this failure of the passage of the act did not entitle S. to refuse to pay the amount of the fees agreed on."

#### *Construction by Parties.*

"Where its (contracts) meaning is clear, an erroneous construction of it by them (the parties) will not control its effects."

En. U. S. Sup. Ct. Repts., vol. 4, p. 574,

citing—

R. R. Co., *vs.* Trimble, 10th Wal., 367.

"In cases where the language used by the parties to the contract is indefinite or ambiguous and, hence, of doubtful construction, the practical interpretation of the parties themselves is entitled to great, if not controlling, influence. The interest of each, generally, leads him to a construction most favorable to himself, and when the difference has become serious, and beyond amicable adjustment, it can be settled only by the arbitrament of the law. But, in an executory contract, and where its execution necessarily involves a practical construction, if the minds of both parties concur, there can be no great danger in the adoption of it by the court as the true one."

En. U. S. Sup. Ct. Repts., vol. 4, p. 574,  
citing—

*Lowry vs. Hawaii*, 206 U. S., 206.

"The universal rule is that where a contract will bear two constructions equally consistent with its language, one of which will render it operative and the other void, the former will be preferred."

En. U. S. Sup. Ct. Rep'ts, vol. 4, p. 573,  
citing—

*Ewing vs. Howard*, 7th Wal., 499.

*Hobbs vs. McLean*, 117 U. S., 567.

*Noonan vs. Bradley*, 9th Wal., 394.

"It is not the duty of the court, by legal subtlety, to overthrow a contract, but rather to uphold it and give it effect; and no strained or artificial rule of construction is to be applied to any part of it. If there is no ambiguity, and the meaning of the parties can be clearly ascertained, effect is to be given to the instrument used, whether it is a legislative grant or not."

En. Sup. Ct. Rep'ts, vol. 4, p. 573, citing—  
*The Burlington Bridge*, 3d Wal., 51, 74.

"The contract must be so construed as to give meaning to all its provisions and \* \* \* that interpretation would be incorrect which would oblit-

erate one portion of the contract in order to enforce another part thereof."

En. U. S. Sup. Ct. Rep'ts, vol. 4, p. 573,  
citing—

Burdon Cent. S. R. Co. vs. Payne, 167 U. S.,  
127, 142.

### **Principles Applied.**

In the light of these authorities let us see if appellee in his brief, pages 30 to 42, has in fact presented the pertinent "action of the parties after March 28, 1906," or shown that "the agreement was superseded and supplemented by what followed" its execution.

He starts out by stating that the only points of uncertainty in the contract were:

"How much Gwydir might be entitled to, and how much the *attorneys* interested by Gordon."

The contract itself on these two points provides:

"Out of said Robertson's share he agrees to compensate R. D. Gwydir by a reasonable compensation. The fees to be divided between said Robertson and said Gordon as herein provided shall be the net sum accruing to said Gordon, after settling with other attorneys under contracts heretofore made by said Gordon."

Assuming that there are two points on which the conduct of the parties may eventually be inquired into for use in interpretation, does appellee present all the evidence or does he run away from it?

He quotes the Conference Committee agreement providing *quantum meruit* basis and concludes therefrom (page 31) that because appellee signed it "for himself and associates" this "would include Gwydir, leaving Robertson *acquit of any obligation to the latter*—the first evidence of a suppression of the memorandum of March 28." (Italics supplied.)

Aside from utter lack of pleading by appellee, under the authorities, to sustain the contention that this contract mod-

ified or affected the former contract, as between appellee and appellant, it must affirmatively appear, among other things, that:

It was so understood by both appellant and appellee, and also that the alleged contract was not abandoned, but performed.

It is enough on this point to show, by appellee's own admissions, that it was not so understood or acted on by himself; that he did not know the motives actuating appellant in the execution of the stipulation, and that the arrangement was never effective.

1. In the first place, appellee stated (R., 107) that the last clause in the contract of March 28, 1906—

*"refers to attorneys who had been previously employed by me under the Maish and Gordon contract," etc., which would not include Gwydir.*

2. Appellee denies that he was under any obligation to take care of Gwydir out of any funds derived on a *quantum meruit* basis. This was his position before the Court of Claims, in a letter to Gwydir (R., 164-5), and in the court of original jurisdiction in this cause (R., 137, 139-140, 141, and 144).

3. As to the reason for the execution of this conference agreement of April 3, 1906, appellee testified (R., 125):

*"I want to state that this agreement to submit this question of the rights of the respective parties to compensation was signed by me because of the claims made by Butler and others, and which were disputed by me \* \* \*. It was voluntarily entered into by me. I do not know what the motives impelling the others were."* (Italics supplied.)

4. Appellee admitted in his testimony in the court of original jurisdiction in respect to the plan of having Conference Committee pass on the fees as provided for in stipulation of April 3, 1906, *"that this opportunity to try this claim was denied to respective counsel"* (R., 127).

So that it thus clearly appears that in the light of the foregoing authorities the conduct and admissions of appellee himself, as well as the provision in this stipulation of April 3, 1906, that "the right of the parties shall remain unaffected," this alleged contract could not have so operated as to rescind or modify the contract of March 28, 1906.

*Raleigh Agreement.*

Appellee in his brief attempts in this connection to violate the rule of law which forbids oral testimony of the meaning of a written contract by presenting the testimony of appellee to the effect that it was made in contemplation of a direct appropriation.

The question under discussion is, Did this contract modify or supersede the previously existing contract of March 28, 1906?

In our previous brief (pages 61 to 67) we have pointed out the fact that its terms were in no way inconsistent with the continued existence of the previous contract between appellant and appellee of March 28, 1906.

Here, again, in addition to a lack of pleading by appellee, the burden is upon the appellee to show:

1. That it was the intention, not only of the appellee alone, but also of the appellant, that it should so operate;
2. That "it must appear that it was the intention of the party proposing it wholly to abandon the original contract, if the modifications proposed were not assented to;" and
3. That the terms of the alleged substituted contract were performed by appellee.

On these three points what does the record show?

1. It certainly does not appear that refusal to execute the Raleigh Agreement would cause appellant to abandon the

contract of March 28, 1906. On the contrary, the finding of the Court of Appeals, adopted by appellee in his brief (page 43), was that the purpose of that agreement was to conciliate Nuzum, and it was doubtless immaterial to Nuzum how appellant and appellee were provided for, as between themselves, in that agreement.

2. Appellee admits in his testimony that at the time of and subsequent to the execution of the Raleigh Agreement he held out to other parties to the agreement that appellant was equally interested with him under the prior separate contract (R., 117, 121-2, 148).

3. Appellant testified in the lower court (R., 133-4-5) that he "*construed the two contracts (of March 28 and April 12, 1906) as one.*" etc.; that in case appellant and appellee had each received \$9,250.00 under the Raleigh Agreement, *appellant* "would have taken care of Gwydir in that case," although the Raleigh Agreement makes no mention of Gwydir.

4. After the execution of the Raleigh Agreement and after the jurisdictional statute had been formulated and when appellee was intending (R., 130) that Butler and Vale should proceed thereunder with his concurrence, he wrote Gwydir under date of May 21 and 26, 1906 (R., 166 and 183), craving certain assistance, and saying in the former letter, "*Robertson has doubtless told you of the status of matters here.*"

5. The contemporaneous construction and conduct of appellant in the premises is shown by the testimony of Gwydir (R., 64-65), from which it appears that immediately upon the return of appellant to Spokane, *after* the execution of the Raleigh Agreement, he showed Gwydir the contract of *March 28, 1906*, between him and appellee and agreed with Gwydir, pursuant to his obligations thereunder, to see him properly compensated for his services from the time appellant became connected with the matter, in 1904, notwithstanding the fact that there was no specific provision for Gwydir in the Raleigh Agreement.

6. By letter of August 1, 1906, to Butler and Vale, copied in part on page 36 of appellee's brief, appellant stated to them that he had "a written contract with Hugh Gordon for one-half of the money recovered either in his name or mine in this controversy"; and all the way through it clearly appears that appellant has uniformly acted upon the theory that the contract of March 28, 1906, was in full force and effect.

7. It cannot be contended by appellee that the Raleigh Agreement has ever been performed; on the contrary, it clearly appears by the record that appellee induced the Court of Claims to disregard it, in making the award, and appellee contended in the court below that the Raleigh Agreement was abrogated by failure of Congress to make a direct appropriation.

Thus, in the light of the authorities presented above, it is clear that the Raleigh Agreement in no sense abrogated or took the place of or relieved either of the parties of responsibility under their contract of March 28, 1906; and that the admitted right of appellant to recovery thereunder is not superseded or affected by either or both of the contracts of April 3 and 12, 1906.

The appellee has not only not presented any evidence showing that the minds of appellant and appellee ever met in reseission or abrogation of the contract of March 28, 1906, but the record is clear and convincing that the continued existence of this contract is the one point on which appellant and appellee did agree in the court below, differing of course however on the scope and construction of said agreement of March 28, 1906.

Indeed, it was the indubitable evidences arising at the time of and subsequent to the execution of the Raleigh Agreement which forced appellee, in the lower court, to admit that the terms of the contract of March 28, 1906, constituted the basic and existent agreement between appellant and appellee, freed from his untenable assertion that, until that

time, the real understanding between the parties was that appellant should secure a new contract with the Indians.

*Appellant's Testimony Before the Court of Claims.*

Appellee, in his brief, disregards the explanation contained in the testimony of appellant (R., 80-81) of his failure to mention the contract of March 28, 1906, in his testimony before the Court of Claims, gives imperfectly the transcript, unfairly discusses the extract from that testimony contained in the record (R., 78-79), and seeks to convey the idea that counsel for appellant must either admit that appellant had perjured himself or that appellant, in fact treated the contract of March 28, 1906, as abrogated by the Raleigh Agreement; and then suggests that the failure of appellant to mention the Raleigh Agreement likewise in his testimony was something which appellee is glad it is not encumbent upon him to explain. To make his contention tenable, it might be said, by way of parentheses, that it is encumbent upon appellee to explain.

With the whole of the deposition of appellant in the Court of Claims available or before appellee, the matter is simple. With the explanation of appellant in the record in this cause (R., 80, 81), there is nothing difficult to a fair mind. From the face of the extract from the testimony in the Court of Claims the omission appears most natural provided the real status of the case, as presented in the Court of Claims, is fairly considered.

The issue was one between Butler and Vale and the Indians, as to what was the value of the services of all attorneys having privity of contract, with the Indians. The only pertinency of the relations of appellant to appellee was that appellant derived his authority through appellee, the only living attorney having privity of contract with the Indians.

The extract is from the cross-examination by counsel for the Government of appellant, who had evidently testified

in chief, in the interests of appellee and appellant alike, of the services rendered by him to the Indians long before the execution of the written contract of March 28, 1906, or that of April 12, 1906. As appellant derived no authority whatsoever from the Indians through the Raleigh Agreement, executed also long after the beginning of his service, that agreement had no pertinency whatsoever to the issue.

The first question of counsel for the Government was limited to the time appellant "*became interested* \* \* \*" whether you (he) *had* a contract" when he so became interested. Appellant truthfully answered that he "did not have a contract, but simply looked for a fair division." And, further, "I was informed by Mr. Gordon (Gwydir) that my services would be compensated by Mr. Hugh H. Gordon, who was the living member of the Maish-Gordon contract, equally with him."

Appellant distinctly testified (R., 79) that he said "Gwydir" and not "Gordon" where the name of Gwydir is supplied above in parentheses, and what followed in the sentence confirms this correction, although appellee's brief makes no mention whatsoever of this correction by appellant under oath (Brief, p. 38).

Appellant further testified truthfully that his (initial) "employment by Mr. Gordon was entirely verbal," namely, through Gwydir as the agent of Gordon as appears in the original brief for appellant.

"Question. Nothing documentary?

"Answer. No, sir; I had a letter from Mr. Gordon, *asking me to look into the matter* and by the way he sent me the original contract, so that I could see the terms of the contract. I have the contract here which I offer."

(The words italicized are omitted from the quotation on page 39 of brief of appellee without asterisks, no doubt by inadvertence, as was the case with counsel for appellant incorrectly using a small letter in a quotation from a letter of

appellee in which he had incorrectly used a large one and of which complaint is made on page 16 of brief for appellee.)

To contend for the first time in this appellate court, in the face of appellee's own plea that the contract was set up and the rights of appellant were adjudicated thereunder in the Court of Claims, that this strainedly discussed omission constitutes conclusive evidence of the abrogation of the contract of March 28, 1906, by the Raleigh Agreement, likewise omitted, notwithstanding the undisputed and indisputable record facts adverse to the meeting of the minds of the parties in such alleged abrogation, and notwithstanding the utter failure of appellee to perform any obligation he might have assumed under the Raleigh Agreement, is a proposition so untenable that it is positively absurd, especially in the light of the authorities above cited.

#### IV.

#### **Alleged Estoppel Against Appellant.**

The only estoppel charged by appellee against appellant in the pleadings is based upon the defense of *res adjudicata* set up in the answer, which, as shown by our original brief (pp. 67-85), cannot be sustained, as there are two, if not all three, of the essential elements lacking.

Notwithstanding this and the failure of the appellee to meet the proposition by argument, and his apparent abandonment in his brief of the averment set up in his answer to the effect that the contract was before the Court of Claims, appellee sets forth in his brief, in the language of the Court of Appeals, the assertion that the doctrine of estoppel applies in favor of the appellee and against the appellant in this cause.

It is true that the Court of Appeals was misled into the erroneous belief that appellant had filed his contract before the Court of Claims, was represented by Butler and Vale instead of by Mr. Patrick, as his private counsel in Washing-

ton, and that appellant in the Court of Claims had craved, expected and received an award in his own name. These errors have been pointed out in the original brief of appellant, as also that court's misconception of the legal effect of the contracts or stipulations of April 3, and 12, 1906.

What possible ground can remain on which to assert the doctrine of equitable estoppel in favor of appellee and against appellant in the case?

To put at rest the renewed suggestion that appellant was a party to the case in the Court of Claims and to foreclose any possible effort on the part of appellee to convert the unjust suggestion in respect to the omission by appellant to exhibit the contract to his testimony before the Court of Claims into an alleged basis for estoppel, the attention of the court is respectfully invited to the case of—

*Hobbs vs. McLean*, 117 U. S., 167.

In this case Hobbs was the assignee in bankruptcy of one Peck, who made a contract with the Government, and the fund involved had been derived as the result of a proceeding begun in the name of Peck, as the contractor, against the United States in the Court of Claims, based upon the Government contract. After the death of Peck the appellees brought suit in a United States court of general equity jurisdiction, claiming the fund as surviving partners of Peck and as holders of equitable assignments from Peck of parts of the fund. In disposing of one of the assignments of error presented in this latter suit this court, speaking through Mr. Justice Woods, said:

"The next ground of complaint against the decree of the circuit court is that the court did not hold the plaintiffs (appellees) estopped from asserting title to the funds in controversy by the fact that they each testified in the suit of Peck against the United States, in which the fund was recovered, *that he had no interest, direct or indirect, in the claim of Peck, except that he held one of the notes or memoranda made by Peck, a copy of one of which has already*

been given (which constitutes an equitable assignment). It must be conceded that this testimony was evasive and disingenuous, but it was not false. But admitting that the testimony was untrue, it is difficult to see how any estoppel is raised which the defendant can set up against recovery in this case by the plaintiffs. An equitable estoppel is raised when there is some intended deception in the conduct or *declaration of the party to the estoppel*, or such gross negligence on his part as to amount to constructive fraud, *by which another has been misled to his injury*. *Brant vs. Va. Coal & Iron Co.*, 93 U. S., 326. If any estoppel could be set up in this case by reason of the testimony of the plaintiff, it would be one in favor of the United States, who alone could have been injured by that testimony. It is clear that the estoppel could not be set up by the defendant, for the evidence was given on his side of the controversy, and he is now in possession of and claims the fund which that testimony aided Peck, whose assignee he is, to recover. There was therefore no injury to the defendant, and no estoppel which he could set up against these plaintiffs. See *Cushing vs. Laird*, 107 U. S., 69." (Italics and parentheses supplied.)

While it appeared that the *whole amount of the award was due and payable to the appellees* and the proceeding in the Court of Claims was therefore *primarily in their interests*, this court held that, *though witnesses before the Court of Claims, they were not parties to those proceedings*.

Although the assignee in bankruptcy averred that the estate had been placed to great expense in prosecuting the proceedings in the Court of Claims and on appeal to this court, upon the theory that they would get something out of it, this court held that the assignee in bankruptcy must stand in the shoes of Peck and the doctrine of equitable estoppel was denied, notwithstanding such averments. The court then proceeds as follows:

"But there is no proof in this record that the defendant was misled by the testimony of the plain-

tiffs, or that he did not know the exact truth when he took the proceedings referred to. In no point of view, therefore, can the defendant assert that the plaintiffs are estopped to claim the fund in controversy."

Applying this authority to the case at bar, what do we have? Of the two, appellee alone had privity of contract with the Indians. Appellant and appellee entered into their contract of March 28, 1903, conceded to be broad enough to cover the funds in hand, and provided that they labor together for a common purpose, and ultimately divide between them the sum received, under whatever theory and in whatever name allowed.

In order to get action by Congress under which something could be recovered they entered into the Raleigh Agreement with other attorneys and appellant went home, leaving appellee to represent their common interests. Appellee agreed to a form of statute, conferring jurisdiction on the Court of Claims, which was not exactly in accord with the Raleigh Agreement, certainly to the extent of allowing Butler and Vale to collect and distribute funds not apportionable to themselves and their immediate associates, as specified in the agreement. It so happened, however, that the form of the statute enacted with the consent of appellee was the only way by which the Government consented to be sued. Appellee at first acquiesced in the plan of procedure provided by the statute, and wrote appellant to secure his co-operation with Butler and Vale, requesting him to send on the Indian contracts for their use. Butler and Vale filed the petition agreeably to the statute in their own names. They laid out a plan under which all attorneys who had served the Indians were to give testimony of their respective services, to the common good of all, to the end that as large an award should be given by the Court of Claims against the Indians as possible. They wrote appellee along these lines and the early correspondence shows acts of co-operation on his part. They

wrote appellant in the same way, and he wrote back making clear his relations with appellee, and calling on them for a response making clear their construction of their relations and obligations in matters of division, in harmony with his contract with appellee and the contract of both appellee and appellant with them. The record shows no written response, but thereafter Vale went to Spokane, and there, as attorney for petitioner, took the testimony of the attorneys in that neighborhood in respect to the services rendered by them severally in the interests of the Indians, including the testimony of appellant.

The only relevancy of the contractual relation between appellant and appellee in this issue between Butler and Vale and the Indians was that there was some privity of contract through appellee with the Indians.

It was to the interest of appellee as well as of appellant that the beginning of his services to the Indians should date back as early as possible. Prior to the execution of the contract of March 28, 1903, appellant had rendered valuable service to the Indians, especially in encouraging them to hold out against making a contract with the Government in respect to the opening up of the south half of the reservation until the Government should agree, as it did agree under such pressure, that payment should be made for the north half.

Whether he remembered all of the details of the correspondence or not is not known, but the fact is that he construed the initial relation as an oral employment by Gwydir as the agent of appellee, and submitted testimony of service for the Indians in the interests of appellee as well as himself.

Promptly upon the completion of that testimony, and under date of October 3, 1906, appellant wrote appellee enclosing him a copy of the testimony and clearly indicating that he was continuing to proceed in the matter in harmony with the plan originally adopted by appellee, namely, to allow Butler and Vale to go on with the case and rely for

the protection of himself and appellee upon their written contract, the letter being such as to call for a statement from appellee to the contrary if it did not meet with his approval. Appellee, on the other hand, had had a disagreement with Butler and Vale over their refusal to execute a supplemental agreement with him, the fact of which dispute had not been communicated to appellant. Appellee remained silent, never answered this letter or, so far as the record shows, did anything in the Court of Claims or elsewhere to cause a reduction in the award, for the benefit of both of them, by reason of his present contention that appellant dated back his employment and service too early. It does not lie in the mouth of appellant to so contend, for he ratified and confirmed the same.

Appellee remained silent until the testimony was completed, and after he determined to intervene he wrote confidential letters to Gwydir evidencing his concealment from appellant of his ultimate purpose.

Not only so; but in the Court of Claims appellee strenuously endeavored to get into *his own hands* and to have awarded in his own name *the full amount of the funds* (except that to Maish's administrators), including that which *he knew would in all likelihood be awarded on account of the services rendered by appellant to the Indians in the premises.*

Where is there any evidence that appellee was misled by the conduct of appellant to his own injury? Appellant all the time, so far as appellee was concerned, surely was frank and open. Appellee promptly received from appellant and had before him appellant's testimony and knew he expected to share equally with him, and he knew of course of their contractual relation.

We submit, therefore, that even if appellant was guilty of moral turpitude in not exhibiting their contract, this would not lay the foundation for or justify the application of the principle of estoppel in favor of appellee against ap-

pellant; and further, that the fact that appellant was interested in the ultimate outcome of the proceedings in the Court of Claims and testified, this did not make him a party to that cause.

## V.

**Miscellaneous Errors.**

We will not burden the court with a detailed discussion of all that is conceived to be erroneous in brief of appellee, as most of these errors are deemed to be immaterial to any issue in the cause.

The assertion (page 2 of appellee's brief) that the alleged McDonald contract was made during the life of the Maish-Gordon contract is seemingly untrue, except only in the sense that the latter was extended by the act of Congress of June 21, 1906 (R., 208, 204-206).

The imputation (page 25 of appellee's brief) of deliberate deception by appellant of the Court of Claims, predicated upon the bare fact that the court found he came to Washington "early" instead of late in March, 1906, is repelled by the last paragraph of the same finding (R., 208, finding VIII), which shows that the court gave credit for service during the month of March, and the record shows that the actual period of time consumed was about the same. Whether the immaterial error was due to the inadvertence of the court or appellant in fixing the exact time does not appear.

The suggestion that the Maish-Gordon contract and the services contemplated by the subject-matter was confined in its scope to services in Washington, D. C. (page 10 of appellee's brief), is seemingly at variance with the ideas expressed by appellee in his correspondence, especially his two letters to Gwydir of August 24, 1903, and April 16, 1904 (R., 151-158), to which the special attention of the court is called, as they also shed light on the credibility of appellant.

These are all matters immaterial to the issues involved in the case as now presented in our humble opinion.

**Conclusion.**

Having shown that no defense is made to the claim of appellant based upon the equitable assignment for \$150, that the scope and legal effect of contract of March 28, 1906, admittedly gave appellant right of recovery, subject only to the alleged effect of the "subsequent contracts and proceedings," and that this right could not be defeated by "what followed" the execution of the contract, it is respectfully submitted that the decree of the Court of Appeals should be reversed, with proper directions in favor of appellant.

GEORGE H. PATRICK,  
GEORGE H. LAMAR,  
*Counsel for Appellant.*

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IN THE  
**Supreme Court of the United States.**  
OCTOBER TERM, 1912.

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NO. 56.

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FREDERICK C. ROBERTSON, APPELLANT  
*vs.*  
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APPEAL FROM THE COURT OF APPEALS OF THE  
DISTRICT OF COLUMBIA.

---

**Supplemental Brief in behalf of Appellee, Gordon.**

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HENRY E. DAVIS,  
*For Gordon, Appellee.*



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APPEAL FROM THE COURT OF APPEALS OF THE  
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**Supplemental Brief in behalf of Appellee, Gordon.**

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In this supplemental brief, filed by permission of the Court, appellee Gordon respectfully submits:

1. That in considering the agreement of March 28, 1906, upon which this suit is brought, it is evident that the relations and situation of the parties thereto, both before and on the date of its execution, and an analysis of the terms of the agreement itself, show clearly that it related exclusively to the new status under Robertson's admitted obligation to secure a new contract with the Indians.
2. That the receipt given by Gordon for the \$150 advanced by Robertson, instead of sustaining Robertson's contention, is proof to the contrary, and that the said \$150

was advanced and expended solely in the effort to secure a new contract and cannot be construed as a consideration for Robertson's alleged claim against Gordon.

3. That the signing of the agreements of April 3rd and April 12th do not, as alleged by Robertson, constitute "admissions" by Gordon that Robertson had a right to share in Gordon's fee, irrespective of the procurement of a new contract with the Indians.

4. That Gordon never employed Robertson under the Maish and Gordon contract, nor did he ever authorize Gwydir or anyone else to so employ him.

5. That the alleged grounds of consideration set forth by Robertson as a basis for sustaining his claim against Gordon are wholly untenable and invalid.

#### **The Agreement of March 28th.**

To get a clear conception of the meaning and intent of the agreement of March 28, 1906, upon which this suit is based, it is necessary to go back to the beginning of the relations between Gordon and Robertson and trace the attitude of both parties up to and including the day upon which that agreement was executed. This is found in the correspondence between Gordon, Gwydir and Robertson preceding the execution of that instrument. There had been no communication between these parties in reference to these relations, except by correspondence, until Gordon met Robertson for the first time on the morning of March 28, when the agreement prepared by Robertson was executed.

That the correspondence shows that Gordon employed Robertson solely to aid Gwydir in securing a new contract with the Indians, and that Robertson occupied throughout solely that relation toward Gordon, is unmistakable.

Robertson, however, has endeavored to create the impression that Gordon's letter of February 8, 1906 (R., 170), indicates an intention on Gordon's part to abandon the effort to secure the new contract and to admit Robertson to a full participation with Gordon in any fee which Gordon might receive.

Gordon denies that he had any such purpose and calls the Court's attention to the top of page 21 in Robertson's original brief, where in professing to quote from Gordon's letter, unwarranted changes have been made in the Record in the effort to make Gordon's words convey a meaning which he did not intend, and which the italicized sentence does not sustain when read in connection with the undisturbed context (R., 171, near bottom). Similar tampering with the text of the Record is seen at bottom of same page (21), at top of page 27, and other parts of Robertson's brief. Upon these efforts Gordon makes no comment, except to say that such methods will not mislead the Court.

To show that neither in this letter of February 8, nor in any subsequent letter, did Gordon manifest the intention ascribed to him by Robertson. Gordon, with the Court's indulgence, will very briefly refer to a few extracts which may have been incidentally mentioned in Gordon's main brief.

In further proof that Gordon had no thought of abandoning the effort to secure the new contract, attention is called to another and subsequent sentence in the same letter (R., 172, middle), where Gordon says:

"If I were not so completely 'strapped' financially, I believe I could go to Washington and command enough influence to prevent the approval of the Anderson-Gordon contract and possibly secure permission to send our representative on the Reservation to make a new deal with the Indians."

To further dispose of Robertson's contention, we find that Gordon, on March 10th, over a month later, is writing to Robertson about the proposed trip to Washington, D. C., to prevent the approval of the Anderson or McDonald contract, as it was afterwards called (against which charges of forgery and fraud had been made), and thus leave the way open for Robertson and Gwydir to secure the new contract. In this letter of March 10, 1906, after emphasizing the necessity of having positive proof of the alleged fraudulent character of the so-called McDonald contract, Gordon writes (R., 87):

"It is going to be very difficult to induce the Department to set aside the other parties and give us leeway unless we can present an exceptionally strong case."

The words "*give us leeway*" unquestionably meant giving a clear field for securing the new contract.

In further demonstration, not only that Gordon had no intention of abandoning the effort to secure the new contract, but also that Robertson knew that Gordon had no such intention and that Robertson himself had no such idea, we find Robertson on March 10th writing Gordon and actually proposing to go ahead and still secure the new contract in case Gordon, after reaching Washington, should wire him to do so. In this letter of March 10th, Robertson writes Gordon (R., 174):

"If you desire me to get additional agreements with the Indians here, on your arrival in Washington, wire me fully and I will send a representative there."

This meant that if Gordon wired him to do so, Robertson would send a representative to the Reservation to secure the new contract.

Special attention is called to the fact that these simultaneous letters of March 10th were written only 18 days before the execution of the agreement of March 28th, and show that, at that late date, Robertson, as well as Gordon, was still intent upon securing the new contract. This was unquestionably Gordon's attitude at the hour he met Robertson for the first time on the morning of March 28th, as the Record clearly shows.

Eleven days after his letter to Robertson of March 10th, Gordon wrote Robertson on March 21st, enclosing a receipt for the \$150 advanced by Robertson to pay Gordon's expenses to Washington, D. C., for the purpose already stated. This letter of March 21 (which Gordon believes would furnish still further proof that the intention of securing the new contract had not been abandoned as Robertson alleges) was not produced by Robertson.

The wording of the receipt itself, however (R., 86), emphasizes the accuracy of Gordon's contention that the status of the relation between Gordon, Gwydir and Robertson was still unchanged. That receipt states that the \$150 was advanced to pay the expenses of Gordon's trip to Washington "to look after the interests of Gordon, Gwydir and Robertson." Had the intention to secure a new contract been abandoned and the interests "to be looked after" had been those under the Maish and Gordon contract, Hall and Edwards would also have been mentioned, as each of them was equally interested with Gwydir under the Maish and Gordon contract; but Gwydir was the only one of the three who was interested in the new deal and hence Gwydir alone was mentioned.

The Court will bear in mind that at the time of Gordon's arrival in Washington he had lost hope of securing an appropriation under the expired Maish and Gordon con-

tract, and it was for this reason that he had been endeavoring, and was still intending, through Cwydir and Robertson, to secure a new contract. Gordon's uncontradicted testimony shows that he arrived in Washington on the night of March 27th, and on the following morning met Robertson and executed the contract in suit before he had ascertained, or had any chance to ascertain, the real status.

Unavoidably detained in Florida, Gordon had been kept in the dark as to the actual status. Butler & Vane, Gordon's employed attorneys, had at that time entered into an alliance against Gordon (R., 70, bottom), and not only failed to answer many of Gordon's inquiries, but when they did answer gave only vague and discouraging reports. Hence, at the hour he met Robertson, Gordon was still discouraged and despondent and knew nothing of the hopeful situation (R., 172, bottom).

Robertson, on the contrary, as evidenced by his cross-examination of Gordon (R., 128), had reached Washington before Gordon, had learned the true status and knew that the appropriation, if not actually promised, was practically assured. He also knew, beyond question, that under the then status he could not possibly render to Gordon any service which could even remotely be a consideration for the interest in Gordon's fee, for which that agreement provided; for, until subsequent to that date, no one, so far as the Record discloses, had expressed a doubt that, if the appropriation for the Indians was passed, it would carry with it a provision for the payment of the attorneys. Certainly no such doubt had occurred to Gordon. Furthermore, if as indicated (R., 128) Robertson knew that the appropriation was so absolutely assured as to render the securing of a new contract an absurdity, then it necessarily follows that he knew he could be of no service to Gordon. If, on the other hand, as Gordon then believed, there was

still grave uncertainty and little hope that Congress would make any appropriation under the expired Maish and Gordon contract, then the completion of the arrangements with Robertson for securing the new contract with the Indians was a natural and wise step to take, and that was the course contemplated by Gordon and the features of the contract itself hereinafter detailed, show that this really was the course contemplated by that contract.

But Robertson, though fully advised as to the exact status and though knowing, as is shown by his cross-examination of Gordon, that the appropriation was assured, kept silent, told Gordon nothing of the confidently expected appropriation, and having prepared an agreement, which as a matter of fact, comported exactly with the still existing relations between Gordon, Gwydir and himself, he inserted into it the words in reference to the Maish and Gordon contract, and presenting it to Gordon at this, their first interview, urged and secured its immediate execution.

An analysis of the terms of the agreement itself shows that they harmonize exactly with the status of Gordon, Gwydir and Robertson under the new deal; but are entirely inconsistent with the status under the Maish and Gordon contract. This is evidenced:

(a) By the fact that it provided that Robertson and Gwydir were to have identically the same interest in the net fee received by Gordon as had been proposed by Gordon in his previous correspondence with Gwydir and Robertson (R., 161):

Had the status under the Maish and Gordon contract been contemplated Gordon could not have made this pledge as will be shown in the items following this.

(b) By the fact Gwydir alone was provided for, and Hall and Edwards excluded, Gwydir being the only one of the three who had any interest under the proposed new contract:

Had the old status been contemplated, Hall and Edwards, who were equally interested with Gwydir under the Maish and Gordon contract (R., 212), would have been named and the compensation for the three (already fixed by contract at 2/45 each) would have been provided for.

(c) By the fact, not only that Gwydir alone was mentioned, but that the compensation provided for him under this new deal was on an entirely different basis than that under the Maish and Gordon contract.

Had the old status, instead of the new, been contemplated, Gwydir's interest would have been the fixed sum of 2/45 as above stated.

(d) By the fact that this agreement provided that Robertson should take care of Gwydir. Under the new deal Robertson and Gwydir (alone) were to share the fee paid them by Gordon for getting the new contract. Therefore, Robertson, when contracting to fix *definitely* the terms of compensation which had been previously proposed by Gordon, naturally was compelled to assume the obligation to take care of his associate Gwydir, and hence this agreement relating to the status under the proposed new contract provided that Robertson should pay Gwydir out of the *half* of the net fee accruing to them jointly:

If the plan for securing the new contract had been abandoned and this contract had related to the status under the Maish and Gordon contract, it would have

been *Gordon's* duty to pay Gwydir, and not Gwydir only, but Hall and Edwards also (R., 212).

Now what was Gordon's attitude? As above stated, he did not know and had had no chance to learn the true status, except from Robertson, *who kept silent*; Gordon had lost hope of securing the appropriation under the expired Maish and Gordon contract, and believed that the only hope lay in securing a new contract with the Indians; he saw that the agreement presented by Robertson harmonized with the existing relations between Gordon, Gwydir and Robertson, and the agreement was signed by Gordon under the conviction that it was supplemental to Robertson's prior agreement to secure a new contract and was a consummation of Gordon's previous proposition as to Robertson's and Gwydir's compensation made in his letter of December 18, 1905.

Now, when these features of the agreement are considered and there is borne in mind the fact that Robertson had no relation whatever with Gordon, except for securing a new contract, and that prior to the execution of the agreement of March 28th he had never even pretended to render any service under the Maish and Gordon contract, nor service of any character, except in the effort to aid Gwydir in getting a new contract, and the further fact that prior to the execution of that agreement Robertson had never made even the suggestion of a claim to any interest, except such as might accrue to him under the proposed new contract (R., 122, middle), it becomes evident that the agreement of March 28th necessarily related exclusively to the new deal, and that it entitled Robertson to share only in fees which might accrue to Gordon and Robertson under the proposed new contract.

Robertson, through his letters to Gordon, had already

agreed to secure the new contract, and the only unsettled matter was the division of the fee, and this agreement fixed that division upon exactly the basis previously suggested by Gordon.

Robertson's inserting into the agreement the words, "Whether allowed under the Maish and Gordon contract with said tribes or on any other theory whatsoever," was assented to by Gordon, for the reasons stated in his testimony (R., 107). In other words, if Robertson and Gwydir secured the new contract, as they had already agreed to do, and thereafter the payment of the fee should be accredited to services rendered under the preceding Maish and Gordon contract, as well as under the new contract, then Gordon would willingly share with them any fee received, no matter upon what ground it might be allowed, and it was to meet this possible contingency that Gordon added the last clause of that agreement, which meant that if payment of the fee should be accredited to service under the old contract as well as under the new contract, then Gordon's prior obligations were to be adjusted before any division with Robertson; but the securing of the new contract was always to be a condition precedent to Robertson's having any claim whatever upon Gordon.

The insertion of this stipulation in that agreement was not insisted upon by Gordon, because Robertson, as above stated, had already agreed to secure the new contract and had no relation whatever with Gordon, except upon that basis, and hence the repetition of that stipulation seemed unnecessary.

### **The Agreements of April 3 and April 12, 1906.**

Gordon denies that his signing the arbitration or quantum meruit agreement of April 3rd and the so-called Ra-

leigh agreement of April 12th constituted admissions that Robertson had any right to a share of Gordon's fee. On the contrary, so far as the quantum meruit agreement of April 3 is concerned, it shows that Gordon was denying and contesting Robertson's claims, as well as those of Butler & Vale.

As has been stated, Gordon, while detained in Florida, had been kept in the dark as to the real status here, and though he did not learn the truth until after his return to Washington in March, Butler & Vale, whom Gordon had employed and upon whom Gordon depended to represent him in his enforced absence, had deserted Gordon, their client, and had made a deal antagonistic to Gordon with Nuzum and others under the so-called McDonald contract, which was afterwards in the Court of Claims, proven to be invalid and worthless.

From the very outset Gordon denied that the agreement with Robertson of March 28, 1906, related to the status under the Maish and Gordon contract and insisted that Robertson had no claim whatever upon him, except such as would have accrued under a new contract with the Indians (R., 122, top). Gordon, at the same time, was denouncing the usurpation attempted by Butler & Vale, and refusing to accede to Butler's demands (R., 119, top), and it was this state of dissension and antagonism between Gordon and Robertson and between Gordon and Butler & Vale, which brought about the arbitration or quantum meruit agreement of April 3d, 1906.

This quantum meruit agreement, instead of being, as Robertson declares, an admission that Robertson was associated with and equally interested with Gordon, is as a matter of fact, proof directly to the contrary. Robertson had no claim against Butler & Vale. Neither were Butler & Vale making any claim against Robertson. Hence there

was no controversy between them. It will be noted that Gordon signed that agreement, "for himself and associates"; therefore, if, as Robertson declares, Gordon was acknowledging him as an "associate and equal co-partner," then Gordon's signing "for himself and associates" would have fully protected Robertson. But the fact was that Gordon was denying Robertson's pretensions, and Robertson, who was asserting a claim solely against Gordon, signed that agreement in his individual and independent capacity, thus placing himself in an antagonistic and contesting attitude toward Gordon, the only party thereto against whom he had made even the pretense of a claim.

The Court of Appeals was unquestionably right in deciding that this arbitration or quantum meruit agreement of April 3rd superseded the prior agreement of March 28th, now in suit (R., 195, bottom). The substance of the Court's opinion on this point is, that while the Conference Committee did not itself undertake the quantum meruit adjudication of the contesting claims submitted to that committee by the agreement of April 3rd, yet, by the action **of the committee and of Congress**, this identical task was delegated to and executed by the Court of Claims, and that in practical and legal effect, the contingency contemplated **in that agreement** was met and the superseding effect of the agreement of April 3rd over the prior agreement of March 28th was made binding by such action.

After declaring that it was unnecessary to discuss the latitude or limitations of the agreement of April 3rd, in its bearing upon the reference to the Court of Claims, the Court further declares:

"Whatever view may be taken of this, certainly those who appeared in that Court and presented their claims for adjudication and received separate and dis-

tinct awards therefor, are bound by their action and the judgment rendered thereon" (R., 196).

### The (Raleigh) Agreement of April 12th, 1906.

Gordon denies with equal emphasis that his signing the agreement of April 12th constituted an "admission" that Robertson was entitled to, or had any valid claim, either legal or moral, to the half or any part of Gordon's fee. That agreement was solely a compromise measure, entered into with the expectation of securing and with the distinctly understood stipulation and condition that its execution would secure, the direct and immediate appropriation by Congress of the fee of \$150,000 (R., 193). No one, not even Robertson, has ever questioned the fact that this was a purely compromise agreement.

At the time this agreement of April 12th was executed, Gordon was still denying Robertson's right to any part of Gordon's fee, except such as would have accrued under a new contract with the Indians (R., 122, top), and with equal earnestness was repudiating the attempted usurpation of Butler & Vale (R., 119, top) as well as the unwarranted claims of Nuzum (R., 126, bottom).

This was the status when Butler and others asserted that certain members of the committee had declared that, if the contending attorneys would agree upon a basis of distribution it would secure the direct and immediate appropriation of the fee of \$150,000; and that unless some basis of distribution was agreed upon, no fee whatever would be appropriated (R., 122, top). Finally, after all protests against the unreasonable demands of Butler and Robertson had proved unavailing, Gordon, who was, as heretofore stated, under serious financial stress at the time, yielded to

the demands, both of Butler and of Robertson, agreed that Nuzum should be recognized, made the exacted concessions, and signed that compromise under the stipulation that it would immediately secure the promised appropriation. But in making these concessions Gordon was not "admitting" that there was either justice or validity in the claim of Butler or Robertson or Nuzum. He was simply yielding under the stress of seeming necessity to apparently unavoidable exactions.

With the full realization that he was the originator of the whole movement in behalf of these Indians; that after Maish's death he was the sole representative of the Indians and the only attorney in the case recognized by the Department; that every other attorney having any legitimate connection with the case had been employed by him, and that after paying every fee pledged in his sub-contracts, he would, under a just recognition of his rights, have had remaining a net fee of over \$50,000 for his twelve years of service in behalf of the Indians, Gordon feels justified in characterizing that enforced compromise as a most unconscionable exaction. Yet Robertson professes to regard the concession made by Gordon under such conditions as an "admission" of his claim.

As to the phraseology in the preamble of this compromise agreement, in which the parties thereto are described as attorneys who "have rendered service to the Colville Indians," Gordon has only to say that the agreement was not prepared by him, and that at the time that paper was signed he was too deeply humiliated and distressed at the seeming necessity for submitting to such an exaction to pay any attention to the niceties of phraseology in which those parties were describing themselves.

Gordon Never Employed Robertson Under the Maish  
and Gordon Contract nor Authorized Anyone  
to so Employ Him.

1. The correspondence between Gordon, Robertson and Gwydir was the only method of communication between them up to March 28th, 1905, when Gordon met Robertson for the first time and executed the agreement now in suit, and in the entire list of Gordon's letters there is not a line to sustain Robertson's contention that Gordon employed him under the Maish and Gordon contract or that Gordon ever authorized Gwydir to so employ him. On the contrary, the entire correspondence shows that Robertson was employed exclusively to aid Gwydir in securing the new contract.

2. Gordon, both in his answer to Robertson's bill (R., 37, par. 5) and in his testimony (R., 101, middle, 102 bottom, 103 top, 106 bottom), denied emphatically that he ever employed or authorized anyone to employ Robertson under the Maish and Gordon contract or for any other purpose than to secure the new contract with the Indians.

3. The testimony of Gwydir, the party through whom Robertson claims to have been employed under the Maish and Gordon contract, fails to show that Robertson was so employed or that Gordon ever authorized such employment. The allegation that Gordon employed Robertson "verbally" is not only not true but impossible, as Gordon never saw Robertson until the morning of March 28, 1906.

4. The burden of proof rested upon Robertson, but he has failed to show any proof whatever of such employment, except his unsupported and positively contradicted statement.

5. If Robertson ever attempted to render any service under the Maish and Gordon contract he made such attempt

as a purely voluntary act without the authorization, consent or knowledge of Gordon, and for all of such alleged services he has been fully compensated by the award made to him by the Court of Claims.

6. Therefore the claim of Robertson that a part of the consideration of the agreement of March 28th was Robertson's service under the Maish and Gordon contract in behalf of Gordon, is absolutely invalid. Gordon never asked nor authorized, nor did he ever expect or receive from Robertson any service whatever, except Robertson's efforts to aid in securing the new contract.

#### **Robertson's Alleged Grounds of Consideration for Agreement of March 28.**

(1) "For services rendered appellee personally by appellant in the spring of 1904."

To this Gordon replies that he does not understand what Robertson means by "services rendered appellee *personally* by appellant." The only service by Robertson ever authorized or recognized by Gordon was, that Robertson should aid Gwydir in securing a new contract with the Indians. This service, if rendered was upon a purely contingent basis, the sole consideration for which was to be Robertson's share of any fee recovered under the proposed new contract. In this matter Robertson was working primarily for his own contingent fee and any benefit whatever to Gordon was conditioned upon and dependent solely upon Robertson's and Gwydir's success in securing the new contract.

(2) "For expenses incurred by appellant exclusive of the advance of \$150."

As to this item, Gordon replies that he was never at any time under the slightest obligation to pay either Gwydir's or Robertson's expenses or any part thereof. They were to pay their own expenses in securing the new contract and Gordon was to pay his own expenses while looking after the prosecution of the claim at Washington under the proposed new contract. The compensation to Gordon on the one hand and to Gwydir and Robertson on the other hand was to be a division of the net fee accruing to Gordon after paying such other counsel as he might deem best to employ.

While it is true that, prior to Robertson's uniting with Gwydir in said undertaking, Gordon did, upon Gwydir's appeal, send Gwydir a check to aid him, yet this was a purely voluntary act on Gordon's part and was so recognized by Gwydir. If Gordon had agreed to pay them with his individual funds for their services and expenses in procuring the new contract they would not have been entitled to any share in the prospective fee to accrue thereunder. The entire burden, both of service and expense in securing the new contract, rested solely upon Robertson and Gwydir.

(3) "For the services of appellant to the Indians as local professional representative of appellee in the State of Washington."

Gordon's reply to item 1 applies with equal emphasis to this. Robertson was never at any time authorized to act as Gordon's "local professional representative in the State of Washington" unless Robertson's agreement to aid Gwydir in procuring the new contract would warrant Robertson in so styling himself. In no other capacity did he have any relation whatever with Gordon.

(4) "For the personal expenses incurred and growing out of the services to be rendered by appellant to

appellee as well as the Indians by his then trip to Washington."

Gordon's reply to items 1 and 2 applies with equal force to this item. Furthermore, Robertson's trip to Washington was taken upon his own initiative and in the company of, and apparently in entire harmony with, Nuzum, who represented interests antagonistic to Gordon, and his trip was in no sense a service to Gordon.

(5) "For the agreement by appellant to compensate Gwydir by a reasonable compensation for his services."

The presence, in the agreement of March 28th, of this provision that Robertson was to take care of Gwydir has already been shown to be one of the conclusive proofs that the agreement of March 28th related solely to the status under the proposed new contract and that demonstration need not be repeated.

#### **The \$150 Advanced by Robertson.**

This money was advanced to pay Gordon's expenses to Washington, and the sole purpose of that trip was to prevent, if possible, the approval of the fraudulent McDonald contract and thus clear the way for Robertson and Gwydir to secure the new contract.

In the division of labor between Gordon and them, the obligation to secure the new contract rested solely upon Robertson and Gwydir. Hence, Gordon, by this trip to Washington, was really doing work which should have been performed by Robertson and Gwydir; and as a matter of justice Gordon should not have been allowed to obligate himself to repay this \$150; but on the contrary some provision should have been made by Robertson and Gwydir

to compensate Gordon for his time expended in doing this work for them. In fact, Robertson must have recognized that this was true, for he agreed (R., 73) to cancel this obligation and to return the receipt given by Gordon.

Robertson would have it that his consent to cancel the obligation was connected with the execution of the memorandum of March 28, 1906, but, to the contrary of this, Gordon's testimony is specific that the cancellation of the obligation was not "until after the compromise was signed" (Rec., 123, fol. 212), meaning the Raleigh agreement of April 12, 1906, which throughout Gordon calls "the compromise."

Certainly this abandoned claim for \$150 cannot be now charged against Gordon, nor can the expenditure of this sum in work which should have been done by Robertson and Gwydir, be treated as a consideration for the interest in Gordon's fee so unjustly claimed by Robertson.

Apart from the foregoing general considerations, which are addressed to the contentions of Robertson's reply brief as a whole, brief attention may be given to the following specific statement in that brief (page 7):

"There is also contained in the brief of appellee the following suggestion, *in this court for the first time* (pp. 9, 37-8), that Butler and Vale are liable to appellant under the Raleigh agreement of April 12, 1906, out of the funds awarded to them by the Court of Claims, and inferentially to the relief of appellee *pro tanto.*"

Reference is here made to the following statements in appellee's main brief:

"As upon receipt of the monies in question by the receivers appointed in the cause, the Secretaries of the Treasury and of the Interior, and the Treasurer of the

United States, were eliminated as parties, so also it has been assumed that Butler and Vale, though appearing as appellees, have no further interest in the premises; and both the courts below and counsel for Robertson in this court have acted on this assumption. Whether the assumption be justified is adverted to hereinafter." (Page 9.)

"Again, in his letter of October 3, 1906 (Rec., 99-100, fol. 167-8), Robertson wrote as follows: \* \* \*

"Plainly, we have here a distinct recognition by Robertson that the agreement between him and Gordon, of March 28, 1906, had given place to the Raleigh agreement of April 12, 1906, that he was relying and depending upon the latter, and that under it he looked as much to Butler and Vale as he did to Gordon for his 'share of the money received.' Under the circumstances, it is difficult to understand why, as hereinbefore indicated, Robertson should now be treating Butler and Vale as eliminated from this cause, instead of pursuing them, as well as Gordon, for what he claims." (pp. 37-8.)

As was urged in the oral argument for Gordon on the hearing, his contention in this connection was and is that inasmuch as, in the Raleigh agreement (Rec., 120-1), the amounts to be received by the respective parties to that agreement are set forth specifically, and exclusively of one another, and as there is in that agreement no obligation by any one of the parties thereto to be responsible to any one of the others for the amount allotted to the latter, there is no more reason for holding Gordon obliged to make up any deficiency to Robertson than there is to make Butler and Vale, or even Nuzum, so responsible; in other words, the agreement indicates no inter-obligation of any of the parties, one to the other, but, as its terms clearly indicate, it provides a specific division, party by party, and amount by

amount. Robertson, however, as pointed out in Gordon's main brief (pp. 36-8) and insisted upon in oral argument on the hearing, plainly regarded Butler and Vale as directly responsible for the protection of his, Robertson's, interests in the premises, and, this being so, it is a complete refutation of his present contention that of all the parties to the Raleigh agreement Gordon alone is responsible for any deficiency in the actual amount awarded by the Court of Claims to him, Robertson; this, of course, upon the assumption, which is again confidently asserted and pressed upon the court, that in making the Raleigh agreement it was the intent of the parties thereto to make that agreement take the place of any former understandings in the premises, and to define the respective shares of the parties without regard to any interobligation on the part of one to any one of the others.

And there is no foundation in the record for the following statement in Robertson's reply brief (p. 23):

"Appellee agreed to a form of statute, conferring jurisdiction on the Court of Claims, which was not exactly in accord with the Raleigh agreement, certainly to the extent of allowing Butler and Vale to collect and distribute funds not apportionable to themselves and their immediate associates, as specified in the agreement. It so happened, however, that the form of this statute indicated that the consent of appellee was the only way by which the Government consented to be sued."

The record will be searched in vain for any, the slightest, testimony supporting this statement. In point of fact, just how Congress came to make the enactment in the terms it used does not appear; and it is a manifest error to speak of the Government as being sued in the premises; what Con-

any share in Gordon's fee was the procurement of the new contract with the Indians, and as no new contract was secured the consideration wholly failed.

Furthermore, Robertson unquestionably made a deliberate decision to enter the Court of Claims and submit his cause to that Court for adjudication. The Court of Appeals, in deciding that Robertson did elect to take this course, bases that declaration, not upon Robertson's letter to United States Attorney Anderson (as Robertson persistently suggests), but upon Robertson's formal testimony, taken under oath on September 27, 1906, for the express purpose of supporting his claim for compensation before the Court of Claims.

This testimony became a part of the record in the Court of Claims, and was the basis of the award made to Robertson by that Court.

It is a matter of no importance whether Robertson's letter to Anderson was or was not delivered. Its chief significance is in furnishing unmistakable evidence of Robertson's deliberate purpose to assert his "independent right" to become an intervenor and submit his cause to the adjudication of that Court, and it disproves Robertson's statement that he did not seek or expect an award from the Court of Claims.

That letter to Anderson is important also in emphasizing the validity of the decision of the Court of Appeals, which, in referring to the case in the Court of Claims, declares that:

"Whatever view may be taken of this, certainly those who appeared in that Court and presented their claims for adjudication and received separate and distinct awards therefor, are bound by their action and the judgment rendered thereon;"

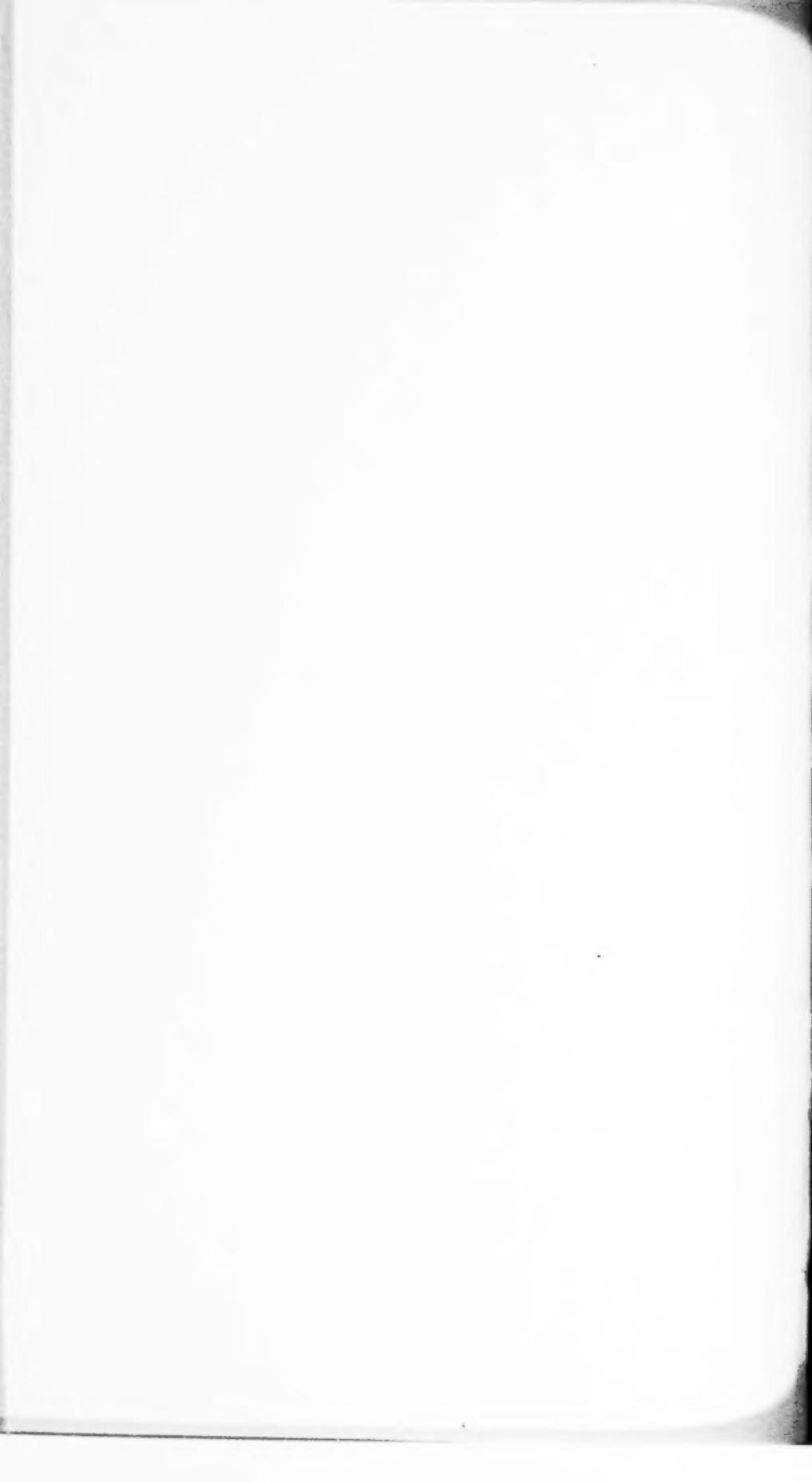
and the further declaration as to Robertson that:

"As a separate award was made to him and to Gordon on the *quantum meruit* basis, we think that his conduct, though lacking a formal pleading, was sufficient to bind him by the judgment rendered and that he is estopped to contradict that judgment."

Respectfully submitted,

HENRY E. DAVIS,

*for Gordon, Appellee.*



FILED.

NOV 29 1912

JAMES H. MCKENNEY

Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

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No. 56.

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FREDERICK C. ROBERTSON, APPELLANT,

vs.

HUGH H. GORDON ET AL., APPELLEES.

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CONCLUDING BRIEF FOR APPELLANT.

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GEORGE H. PATRICK,  
GEORGE H. LAMAR,

*Counsel for Appellant.*



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**CONCLUDING BRIEF FOR APPELLANT.**

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This case was submitted on oral argument Friday, November 15, 1912, at which time counsel for appellee requested leave to file in five days a brief in reply to that of appellant, a copy of which had been delivered to counsel for appellant the day before the argument, and the court denied the request.

Ten days after the conclusion of the argument, to wit, on Monday, November 25, 1912, counsel for appellee presents a "supplemental brief," in which it is stated that the same is "filed by permission of the court," and appellant's counsel are advised by the clerk of leave to file a concluding brief.

## I.

**Case as Presented.**

The case as presented, freed from immaterial matter, is comparatively simple, and is set forth in detail and as fairly as counsel for appellant are capable of presenting a case, in the two briefs which they have heretofore filed.

Briefly stated, it is as follows:

The bill sets out two written contracts between appellant and appellee, one providing on its face for a division between the parties equally of all money—

“which may accrue to said Gordon or said Robertson as attorney's fees, growing out of the rendition of services to the Colville Tribe of Indians, whether allowed under the *Maish-Gordon contract* with said tribe, or on any other theory whatsoever, which said interest is to enure to either party, no matter in whose name such allowance is made. *Both parties hereto to mutually labor to secure such allowance.*”  
(Italics supplied.)

The other paper writing acknowledges the receipt by appellee from appellant of \$150.00 and promises to repay the same “out of my share of the profits” in case of success, “in collecting said claim.”

The bill further avers the happening of the events, mentioned in each of the contracts, and prays, among other things, for a distribution of the fund, which is now in court, between the parties in accordance with the terms of these two written instruments.

The answer of the appellee admits the execution by him of both instruments and the happening of the event and also the receipt of the \$150.00.

Without any plea of fraud or mistake, in the execution of the first instrument, appellee has undertaken the impossible task of setting up a defense *contrary to the terms of the*

written instrument and based upon the oral testimony of appellee as to the alleged contrary intentions of the parties when the instrument was executed, which cannot be done without doing violence to the numberless authorities on the subject, including those cited in our original brief, pages 95 to 98 and—

Brown *vs.* Slee, 163 U. S., 828, 834, 837-8.

His defense to the other instrument, as set up in his answer, is most unique, if not ridiculous. Admitting its execution, admitting the receipt in cash of the full amount named in the equitable assignment, admitting success in securing funds, exhibiting to his answer findings of fact by the Court of Claims showing that he was credited on the allowance by that court involving his presence in Washington in the spring of 1906, admitting that the expenses of that trip were paid out of and by the use of said sum of \$150.00, appellant avers in his answer as a defense to the claim, alleged failure of consideration for the other and wholly different contract, which he also seeks to repudiate.

The only other defense made, by pleading, to either or both of these instruments was that of *res adjudicata*, set up in the eighth paragraph of the amended answer (R., 41), in which it is averred that appellant appeared in the Court of Claims, "and submitted his claim to one-half of the compensation to be allowed to this defendant," which averment was not only rebutted by Exhibit "A" to his answer (R., 202-222), consisting of the findings of fact, conclusions of law and opinion of the Court of Claims; but also by the undisputed testimony in this cause, including that of appellee himself, as more particularly pointed out on pages 69 to 72 of our original brief. This brief, pages 67 to 85, also shows conclusively that there was an utter absence of the essential elements whereon to base a plea of *res adjudicata*. And, according to the decision of this court in the case of Hobbs *vs.* McLean, 117 U. S., 167, cited and quoted

in the reply brief of appellant, pages 21 to 23, appellant's interest in the outcome and testimony in support of the claims asserted in the proceedings before the Court of Claims, does not justify the contention that appellant was even a party to those proceedings.

Thus we have absolutely nothing by way of tenable pleadings on behalf of appellee on which he can base a defense to these two admittedly executed written instruments; and there is nothing more to the case, unless it be that either the theory of the Supreme Court of the District of Columbia or the *different theory* of the Court of Appeals of the District of Columbia is tenable; and neither presents a theory by which to avoid the obligation of appellant of \$150.00, represented by the equitable assignment, and both start with, as a valid obligation, the written contract of March 28, 1906.

#### *Lower Court's Position Admittedly Wrong.*

In essence, the theory of the lower court was that the contract of March 28, 1906, was not sufficiently broad in scope to include the funds in hand. Its error in this regard is sufficiently pointed out in our original brief, pages 49 to 55; and neither, by oral argument nor by brief, does appellee take exception to the correctness of this argument. On the contrary, appellee, pages 42-43, in his original brief, expressly accepts as correct the contrary theory, as asserted by the Court of Appeals, quoting said opinion, on this particular point, as follows:

"The contract of March 28, 1906, seems broad enough in its terms to apply to fees that might be received by Gordon under direct appropriation *or otherwise*, on account of his Indian contract, and would, we think, warrant a recovery by Robertson, if it were not for the subsequent contracts and proceedings."

Thus we have, in the brief of appellee, a clear admission in effect that the Supreme Court of the District of Columbia was wrong and that the Court of Appeals was right so far as the scope of this contract is concerned; and that the same was sufficiently broad to cover the funds in hand and also that appellant is entitled to recover thereunder, unless it can be shown that his rights are changed or modified by alleged "subsequent contracts and proceedings."

*"Subsequent Contracts and Proceedings."*

These contracts were discussed in detail in our original brief, pages 56 to 67, and the law and the evidence applicable thereto are further set forth in our reply brief, pages 5 to 20.

The so-called "subsequent proceedings," with authorities applicable thereto, are set forth at length in our original brief, pages 67 to 101, and in our reply brief, pages 20 to 25, and the logical conclusions adverse to those of the Court of Appeals remain unanswered, either by brief or oral argument on behalf of appellee.

From a careful perusal of the record facts and authorities, in these prior briefs set forth, we are confident that this court will conclude that the Court of Appeals was in error in its holding that the admitted right of appellant to recover under the contract of March 28, 1906, was modified or lost by any connection appellant had with any such subsequent contracts or proceedings; and, further, by reason of the attitude of appellee in the Court of Claims inconsistent with his attitude in this cause, as well by reason of his attitude toward and concealment from appellant (set forth in our original brief, pages 85 to 94), he is estopped from receiving the character of relief sought to be accorded him by the Court of Appeals, and *first asserted in this cause* by appellee in the language of that court in his original brief, pages 42-44.

## II.

**Appellee's Major Premise Contradicted by Answer.  
Adjudications, Written Contract, and His Position  
in Court of Claims and Admissions in This Court.**

After the admissions contained in the introductory paragraph and the first sentence quoted by appellee from the opinion of the Court of Appeals (appearing on pages 12 and 13 of the original brief of appellant) as to the scope of the contract of March 28, 1903, and the right of appellant to recover thereunder but for alleged "subsequent contracts and proceedings," and in view of an utter absence of any plea on which to avoid or modify the terms of this written contract, it would seem that this court and counsel for appellant should be relieved of the necessity of going through and pointing out the numerous inaccuracies of statement contained in the persistent argument of a proposition thus wholly eliminated from the consideration of this court in this cause, namely:

*Appellee's Major Premise.*

That the appellant never rendered any service under, and was not admitted to share in the proceeds arising by reason of privity of contract between appellee and the Indians through the Marsh-Gordon contract.

This proposition is contrary to and rebutted

1. By Exhibit "A" to the answer of appellee, finding VIII of the Court of Claims (R., 208), that

"Frederick C. Robertson, an attorney-at-law of Spokane, Wash., became interested in the matter of the claim of said Indians through the solicitation of Hugh H. Gordon under the Marsh-Gordon contract in the latter part of 1903 or 1904. \* \* \* He paid the expense of having Mr. Hugh Gordon come

to Washington, and then for the first time met Vale and Butler and discussed the case with them, and with them undertook to map out such line of action as would conduce to establishing the rights of the Indians. He prepared a brief on the subject and saw the members of the Conference Committee and laid before them his views on the rights of said Indians. That he supplied Marion Butler from time to time with facts upon the matter. \* \* \*

"It appears that besides the services rendered in the month of March, 1906, in Washington, D. C., as aforesaid, *said Robertson worked on the matter a year or more at Spokane.*" (Italics supplied.)

2. By the express provisions of the written contract of March 28, 1906 (R. 4), between the parties

"that they shall share equally in all monies appropriated by Congress, or allowed by the Interior Department, which may accrue to said Gordon or said Robertson as attorney fees, *growing out of the rendering of services to the Colville Tribe of Indians, whether allowed under the Maish-Gordon contract with said tribe, or on any other theory whatsoever, which said interest is to enure to either party, no matter in whose name such allowance is made.* *Both parties hereto to mutually labor to secure such allowances.*" (Italics supplied.)

3. By the conduct before the Court of Claims of the appellee, who, with a copy of the testimony of appellant before that court in his hands and with the whole record before him on which the findings of that court were predicated and without denying the correctness of the charge against the funds of the Indians under privily of contract thus traced by appellant through appellee and predicated upon the Maish-Gordon contract, expressed the intention (8th paragraph intervening petition, R. 228), "that such obligations shall be faithfully carried out according to the terms and letter thereof," and admittedly requested the Court of Claims (R. 133) to award to appellee and in his name, the full amount

that court should find to have been earned, as against the Indians, as a result of the services of all counsel (including appellant), leaving to appellee, as the surviving contractor with the Indians, to carry out the obligations of Maish and Gordon, contracted during the lifetime of Maish, and of appellee, as contracted subsequent to the death of Maish.

4. By the holding of the Court of Appeals of the District of Columbia in *Gordon vs. Gwydir et al.*, 34 D. C. Appeals, 508-516 (as quoted on page 38 of our original brief), to the effect that the *Maish-Gordon contract*—

*"was the foundation of the award actually made to them (Maish's administrator and Gordon) \* \* \* without that contract as a foundation for the services rendered, they would have had no standing whatever in the Court of Claims,"* (Parentheses and italics supplied.)

5. By the admission contained in his original brief, pages 42-43—

*"that the Court of Appeals clearly, correctly, and exactly solved the matter in issue, as follows (R., 195-6):*

*"The contract of March 28, 1906, seems broad enough in its terms to apply to fees that might be received by Gordon under direct appropriation or otherwise, on account of his Indian contract, and would, we think, warrant a recovery by Robertson if it were not for the subsequent contract and proceedings," etc. (Italics supplied.)*

### III.

#### Persistent Untenable Argument.

Notwithstanding this, appellee in his supplemental brief makes persistent effort to have this court, without pleading mistake or fraud in the execution of the instrument, allow the express terms of this contract to be varied by the oral

testimony of appellee as to his own intentions or constructions, supplemented by references to those parts of the previous correspondence in which the parties were discussing the desirability, feasibility, and difficulties of curing the weakness incident to the expiration by limitation of the Maish-Gordon contract, by securing either an extension thereof or a new contract under existing law through the action of the Indians requiring approval by the Secretary of the Interior.

In urging this, however, appellee carefully steers clear of the bald and indisputable fact that at the time this contract of March 28, 1906, was made, the negotiation and approval of such new Indian contract was admittedly (*R.*, 127) impossible; and the further fact that the combined efforts of appellant and appellee, under and in accordance with the terms of their said written contract, did result in such legislative recognition of said Maish-Gordon contract as to revivify and constitute a practical extension of that contract.

#### *Certain Salient Points.*

In view of the character of the arguments of appellee, both by brief and orally, appellant will have to rely upon the wisdom and justice of this court to make due allowance for the many errors, both of statement and of aspersion, which desperation has doubtless engendered; but we will endeavor to state, as succinctly as may be, certain salient points of possible usefulness to the court at least in determining the line of cleavage.

(1) Upon the execution and approval of the original Maish-Gordon contract, the services Gwydir, Edwards, and Hall had undertaken to perform under their contract with Maish and Gordon had been completed; and it only remained for a recovery to be had under the Maish-Gordon contract to entitle them to receive their  $\frac{6}{45}$  part of the net amount received by the contractors, Maish and Gordon.

This proposition is sustained, so far as the parties to that

argument are concerned, by the decisions of both courts below against Gordon and Maish's administrator.

36 Washington Law Reporter, 694.

Gordon *vs.* Gwydir *et al.*, 34 D. C. App., 508-516.

(2) Gwydir was in no way responsible for the entrance of appellee in the army or for his failure, prior or subsequent thereto, to diligently prosecute the Indian claim during the life of the Maish-Gordon contract, and it was not incumbent upon him to render further service without additional compensation.

(3) The basic idea and the main object to be accomplished, from the beginning of the correspondence with Gwydir in 1903, in anticipation of the expiration of the contract, was to continue the life of the contractual relations between Gordon (or his privies) and the Indians, until the claim of the Indians could be substantiated or recognized by the Government.

The methods proposed or discussed from time to time, relate more to form than to substance and are regarded to be immaterial. The fact is that Gwydir was first chosen by appellee, as his agent, with broad powers and discretion to represent his interests in the premises, with assurances of fair dealing and liberal compensation to him and to those whom he might interest in appellee's behalf.

(4) However illegal the considerations and reprehensible in appellee to suggest their offer by Gwydir to the Indian agent and Indian chiefs (R. 151-2), and, however considerate counsel for appellant may have been of appellee in refraining from giving emphasis to appellee's reprehensible conduct, of doubtful materiality to any issue in the cause, the fact is that, by a legitimate exercise of his broad, as well as special authority, Gwydir, as the agent of appellant, did interest appellant in the matter, and his action in this regard was ratified and confirmed by appellee, over and over again as abundantly shown by documentary evidences of record.

(5) That appellant "became interested in the matter of the claim of said Indians through the solicitation of Hugh H. Gordon under the Maish-Gordon contract in the latter part of 1903 or 1904," is a fact adjudicated by the Court of

Claims in its finding of facts VIII (R., 208), and, in effect, set up by appellee in his answer, to which these findings were exhibited; and privity of contract with the Indians, though appellee under the Maish-Gordon contract was material to the issue before the Court of Claims, regardless of the name by which the award for his services was to be made.

(6) Appellee admittedly failed to contest the accuracy of the testimony on which this finding was based; but, with a copy of the deposition of appellant in hand, sought an award, in his own name, based in part upon the services to the Indians, alone allowable according to the statute, under such privity of contract with the Indians through appellee, under said Maish-Gordon contract.

(7) Agreeably to this interpretation by appellant of his early relation to the matter, the correspondence between him and appellee show, unmistakably, that appellant considered that he had an interest in the claim for fees, regardless of the manner or form by which the same should eventually be effectuated—whether through the Maish-Gordon contract itself or any renewal or extension thereof, either through the act of the Indians with the approval of the Secretary of the Interior, under general law, or by special action by Congress being entirely immaterial—and nowhere in the correspondence does appellee dissent from this view on which appellant was known by appellee to be making expenditures of both time and money and rendering service of essential importance to appellees.

(7) Appellee accepted the advance of \$150 and executed the equitable assignment therefor, under date of March 21, 1903, upon receipt of a letter from appellant, dated March 10, 1903 (R., 174), making clear his said construction of their relations and appellant's existent interest under "this old agreement" between Maish and Gordon and the Indians. This letter reads in part as follows:

"DEAR SIR: I enclose you herewith a draft for \$150.00 which will enable you to go to Washington, and protect our interests there. I do not believe that without a recognition of your contract any subsequent contract with the Indians can be put through over your opposition. \* \* \*

*"It may be several bills are pending in Washington, but their character can be examined by you better than by me. If you need my assistance to protect us and you bring our interests to the attention of Senators McHenry and Foster in the Senate, and my interest to Senators Ankney, Piles, and Dubois in the Senate, and I am satisfied that they will protect our interests to the extent that you can show that we are entitled to their protection under the rules of equity and good conscience. \* \* \**

*"It is reported that Mr. Nuzum and Judge Gordon are starting to Washington to be presented to the President about the 20th of this month. You should be on the ground there and protect your interests. Mr. Broussard of Louisiana, and my brother, S. M. Robertson, and other Louisiana delegates, together with men who know you and me would undoubtedly protect us in this old agreement if they believed we were justly entitled to compensation. I believe that an approved agreement such as you have, is much better than another approved agreement such as Anderson has; although they rely on Senator Lafollette, who is a friend of Mr. Nuzum, and other influential Senators to take their view of the matter.*

*"I would not precipitously start a fight against Anderson, for this might preclude any consideration of the attorney's fees, but I would size the situation up carefully, and if our interest is not to be protected, then I would oppose them."* (Italics supplied.)

(8) The correspondence is incomplete and it does not appear from the record whether appellee expected appellant, as a result of telegraphic communication or otherwise, nor does it appear when appellant arrived in Washington; but, as appellee came to Washington on the proceeds of the draft enclosed in said letter of March 10, 1906, *he knew the contents of that letter when he reached Washington*, and, therefore, the contract of March 28, 1906, was executed, in the light of what was said by appellant therein, *outlining as it did the possible line of action which was actually followed thereafter*; and the suggestion of fraud or deceit or lack of necessary information on the part of appellee as contained in the brief and oral argument for appellee would be puerile, even if he had a pleading whereon to support it, which he has not, and even if he had not admitted in his testimony

that he knew no act of appellant inimical to appellee's interests (R., 139), except his action in seeking compensation for his services.

(9) The written contract of March 28, 1906, between the parties, as we have shown, was sufficiently broad and the future services and assistance and the obligations thereby assumed on the part of appellant were sufficient in law to warrant a recovery, even though appellee were correct, which he is not, in his interpretation of their pre-existing relations.

(10) The legislative status at the time of the execution of this contract of March 28, 1906, was not that indicated on page 6 of the supplemental brief of appellee, but was this. The Indian Appropriation Bill No. 15331 had passed the House without any provision whatsoever, either in recognition of the claims of the Indians or for the payment of counsel fees. The only thing then pending was the proposed amendment to the bill, as introduced in the Senate by Senator Ankeny on March 15, 1906 (Cong. Record, 3838), providing for the fulfillment of the agreement with the Indians of 1891 by setting aside in the Treasury for this use \$1,500,000, and *without making any provision whatsoever for the payment of counsel.*

(11) The personal status of appellee at that time was this. He was the holder of an expired Indian contract, whose acceptance had been made by Maish, not a partner (as he afterwards claimed), while appellee was disqualified under the law from prosecuting a claim against the United States by reason of his then being an employee of the United States as an officer in the United States Army, and Maish having died some weeks before his discharge. Save and except services rendered by other counsel thereunder, appellee had rendered no personal labor for the Indians since the formal acceptance of the contract. Besides the services rendered by appellant, under authority of appellee, no services whatsoever had been rendered the Indians *subsequent to the date of the expiration of the Maish-Gordon contract wherein to prosecute a claim before Congress of continued service thereunder* except those of Butler and Vale, against whom appellee was then inveighing by reason of appellee's claim, among others, that they had accepted employment under the so-called Anderson-McDonald contract, asserted in antagonism to the Maish-Gordon contract. Appellee was then, and had been for many years, a resident of the Far South, and his finan-

cial situation was such that his then visit to Washington *was alone made possible or feasible* by the advancement he had received from appellant based on an equitable assignment of a part of his claim, one of the obligations he is now repudiating.

(12) This contract of March 28, 1906, and its provision, "Both parties hereto to mutually labor to secure such allowance," constituted a clear ratification of the action of appellant in coming to Washington, even if there were the slightest basis in the record justifying the criticisms of the propriety of such visit, although there is no such record basis.

(13) The provisions in the contract under which appellant assumed the obligation "to compensate R. D. Gwydir by a reasonable compensation" out of his "share" was a natural and proper one, was ratified by Gwydir upon the return home of appellant *subsequent to the date of the Raleigh agreement of April 12, 1906*, and insured to Gwydir compensation not covered by the contract between Maish and Gordon for their joint service in negotiating the Maish-Gordon contract.

(14) The Conference Committee agreement of April 3, 1906, was not inconsistent with that of March 28, 1906, but had it been, no award having been made by the Conference Committee under it, *by its own terms*, "the right of said parties shall remain unaffected."

(15) The Raleigh agreement of April 12, 1906, was in no way inconsistent with the terms of that of March 28, 1906, it made equal provision for both appellee and appellant; made no specific provision either for Gwydir or for Gwydir, Edwards, and Hall; and, for the reasons set forth on pages 15 to 18 and in the authorities cited and discussed on pages 8 to 13 of our reply brief, the Raleigh agreement could not have canceled or modified the obligations of the prior contract of March 28, 1906.

(16) Appellee admits, in his testimony (R. 117, 121-2, 148), that subsequent to the execution of the Raleigh agreement he held out to other parties thereto that he was equally interested with appellant under the prior separate agreement. Appellee testified (R. 133-4-5) that he "*construed the two contracts* (of March 28 and April 12, 1906) *as one*," etc., and

that in case appellant and appellee had each received \$9,250 under the Raleigh agreement *appellant "would have taken care of Gwydir in that case,"* although said agreement makes no mention of Gwydir.

(17) The only basis for uncertainty in the construction of the contract of March 28, 1906, is whether or not that part of the claim of Gwydir, Edwards, and Hall for negotiating the original Maish-Gordon contract, *not chargeable against the funds of Maish's administrator,* is to be paid out of the common fund of \$16,000 before division between appellant and appellee, *i. e.,* were Gwydir, Edwards, and Hall "other attorneys" within the meaning of the contract? At the time of the filing this bill and when the answer of appellee was made thereto, there was litigation between Gwydir, Edwards, and Hall and appellee in which appellee denied their claim; and no issue was raised by the answer of appellee in this cause whereunder testimony could properly be introduced on the subject; but, in the testimony of appellee (R., 143-144), he took the position that these claims for services in negotiating the original Maish-Gordon contract should be deducted from the fund of \$16,000 allowed in the names of appellee and appellant, in the event the right of appellant to share with him under the contract of March 28, 1906, is sustained.

(18) Appellee, being interrogated by appellant, testified (R., 149) as follows:

"Q. Why is it not a fact, Major Gordon, that at the time I left, you and I were in close association, fighting Butler and every one else to protect the interests that we had contended we had by reason of our services?"

"A. After determining on a compromise, *it is true.*"

### **Conclusion.**

There was much in the oral argument of counsel for appellee which was so unjust to appellant that counsel regretted the lack of time to make oral reply, and there are statements in both briefs of appellee to which we earnestly dissent, but as to all of which we desire to relieve this court of the annoyance of any unseemly controversy between

counsel. Without further detailed discussion, we confidently leave the case to the court with these concluding suggestions:

Pursuant to the terms of the contract of March 28, 1906, appellant, in daily contact and co-operation with appellee, remained in Washington for weeks, with the ultimate result that the conflicting interests were so harmonized as that the natural antagonisms between counsel, other than appellant and appellee, did not operate so as to postpone or prevent the passage of the provision for the Indians; and such provision was not only made, but there was also secured a congressional enactment the effect of which was to transform appellee's comparatively worthless claim, under an expired contract, into a legalized right against the funds of the Indians to the extent of the value to the Indians of every effort which had been put forth on their behalf by counsel under color of the Maish-Gordon contract, including those of appellee and appellant.

If there was ever a contract the consideration for which, as between the parties, could and should not be questioned, it is this very one—a contract between two attorneys, one of whom presumed possibly for two years upon the good name and professional integrity of the other before a formal contract was made, and the other a man who unblushingly comes before this court, higgling over and trying to distort the basic purpose of every written word and act, repudiating even his written obligation to repay cash advanced him by appellant in the extreme hour of his need and but for whose timely interposition appellee would doubtless have received nothing whatsoever, would have remained in Florida, ignorant of conditions in Washington, without being heard or represented, while Butler and Nuzum proceeded before Congress, as appellee himself claims they had theretofore been proceeding, without regard for any claim appellee might have had under the long expired Maish-Gordon contract.

GEORGE H. PATRICK

GEORGE H. LAMAR,

*Counsel for Appellant.*



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Syllabus.

## ROBERTSON v. GORDON, AND BUTLER AND VALE.

## APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 56. Argued November 15, 1912.—Decided December 16, 1912.

A contract between attorneys for division of fees construed according to the definite meaning therein expressed.

*Quare* whether evidence to prove that there was a condition precedent to be performed before a contract took effect is admissible without a cross-bill.

Under a contract by attorneys for division of fees, if the attorney claiming did any work, whether more or less, there is no failure of consideration.

Where an agreement to leave a dispute as to amounts due under a contract to certain third parties provides that in case of their refusal to act no rights are affected, it is not permissible after such a refusal to bring in an attempt of another tribunal to adjudicate the claim.

The decision of a court that has no jurisdiction of the subject-matter or the parties is not *res judicata*.

An act of Congress directing the Court of Claims to determine the amount due attorneys for fees in an Indian litigation to be apportioned by certain attorneys named amongst all entitled to share as agreed among themselves, concerns only the amount and not the manner of distribution, *United States v. Dalour*, 203 U. S. 408, and so held as to the act of June 21, 1906, c. 3504, 34 Stat. 325.

In this case a contract between two attorneys agreeing to share equally all fees received from an Indian litigation, held not to have been superseded by a decision that one was entitled to a much larger share than the other made by the Court of Claims under authority of an act of Congress authorizing it to determine the total amount due to all attorneys.

34 App. D. C. 539, reversed.

The facts, which involve the construction of a contract between attorneys for division of fees, are stated in the opinion.

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*Mr. George H. Lamar, with whom Mr. George H. Patrick was on the brief, for appellant.*

*Mr. Henry E. Davis for appellees.*

**MR. JUSTICE HOLMES** delivered the opinion of the court.

This is a suit upon the following contract:

March 28, 1906.

This agreement made between F. C. Robertson and Hugh H. Gordon, witnesseth, that they shall share equally in all monies, appropriated by Congress, or allowed by the Interior Department which may accrue to said Gordon or said Robertson as attorney fees, growing out of the rendition of services to the Colville tribe of Indians, whether, allowed under the Maish-Gordon contract with said tribes, or on any other theory whatsoever, which said interest is to inure to either party, no matter in whose name such allowance is made. Both parties hereto to mutually labor to secure such allowance. Out of said Robertson's share he agrees to compensate R. D. Gwydir, by a reasonable compensation. The fees to be divided between said Robertson & said Gordon as herein provided shall be the net sum accruing to said Gordon, after settling with other attorneys under contracts heretofore made by said Gordon.

F. C. ROBERTSON.  
HUGH H. GORDON.

There is also a claim upon a receipt signed by Gordon for \$150 given by Robertson to Gordon "with which to pay expenses of trip to Washington, D. C., to look after the interests of Gordon Gwydir & Robertson in the matter of the claim of the Indians, of the Colville Reservation against the U. S. Government. In case we succeed in collecting said claim, I agree that out of my share of the

profits, I will repay to said Robertson the said one hundred and fifty dollars." This was dated March 21, 1906, a few days earlier than the one first set forth.

By an act of June 21, 1906, e. 3504, 34 Stat. 325, 377, 378, a million and a half dollars were set aside by Congress for payment to the Indians in respect of the matter as to which the contract contemplated that services would be rendered to them. This statute also gave jurisdiction to the Court of Claims to render a judgment in favor of Butler and Vale, attorneys, for all services by all lawyers to the Indians; the amount to be paid out of the fund and to be apportioned among such lawyers by agreement among themselves. One fifth of the fund was paid over to the Indians under an act of March 1, 1907 (34 Stat. 1015, e. 2285). By an act of April 30, 1908, e. 153, 35 Stat. 70, 96, another fifth was directed to be paid over in pursuance of the statute of 1906. Meantime Butler and Vale had brought their suit in the Court of Claims and on May 25, 1908, the court gave judgment for a total of \$60,000, of which it undertook to apportion \$14,000 to Gordon and \$2,000 to the plaintiff and appellant. 43 Ct. Cl. 497, 525. Thereafter in August, 1908, this bill was filed to secure payment out of the Indian fund and to establish the plaintiff's right to an equal share in the amount allotted to Gordon and a lien upon that amount for such share and for the \$150 additional advanced as above set forth.

The controversy is wholly between Robertson and Gordon and it is unnecessary to refer to the other parties or other aspects of the case. The Maish-Gordon contract with the Indians had expired at the time of the agreement in suit and one of the defences is that the agreement was made upon the implied understanding and condition that Robertson should get a new contract with the Indians, which never came to pass. The other defences are that the matter is concluded by the judgment of the Court of

Claims, and that the agreement was superseded by two other agreements of a little later date, made when the matter of an appropriation for the Indians was pending in Congress. The first of these, dated April 3, 1906, and signed by Gordon, Robertson, Butler and Vale, was that the parties would submit to the Conference Committee of the Senate and House their respective claims for services, on a *quantum meruit*, and would abide by any award that should be made, "and in case no award shall be made the rights of the said parties shall remain unaffected." The second agreement dated April 12, 1906, between Marion Butler and R. W. Nuzum, each on behalf of himself and others not named, and Gordon and Robertson, was, that, provided the sum of \$150,000 was allowed for payment of attorneys representing the Indians, \$18,750 should be paid to Nuzum, \$9,375 to Gordon, and \$9,375 to Robertson; the remainder to be distributed by Butler as he elected. "Should the appropriation be less, then this agreement is to be the basis of distribution, sharing pro rata in such diminished sum, as the percentage is thereby diminished." Both of the last two defences seem to have been sustained by the Court of Appeals. 34 App. D. C. 539. See for details not material here *Butler v. Indian Protective Association*, 34 App. D. C. 284; *Gordon v. Gwydir*, 34 App. D. C. 508.

We are of opinion that the decree must be reversed and that the plaintiff is entitled to prevail. He starts with a contract of definite meaning. We perceive no ground for the doubt suggested in the court of first instance whether this agreement applies to a sum allowed by the Court of Claims. That court merely rendered certain the amount appropriated in terms by Congress out of the Indian fund. The argument that there was a condition precedent that a new contract should be made with the Indians, although no doubt such a contract was hoped and worked for, is irreconcilable with the instrument as it stands and ap-

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pears to us not to be supported by the evidence, if that evidence were admissible without even a cross bill. *Sprigg v. Bank of Mount Pleasant*, 14 Peters, 201, 206. *Brown v. Slee*, 103 U. S. 828. *Simpson v. United States*, 172 U. S. 372. Again there is no doubt that Robertson did some work, whether more or less does not matter, so that there was no failure of consideration, according to the common rather inaccurate phrase. The only questions then are those concerning the effect of the later contracts and the decree of the Court of Claims.

The contract of April 3, proposing to submit all claims to the Conference Committee of the Senate and the House came to nothing, because the parties were informed that the Committee would not undertake to settle disputes between lawyers. By the express terms of this instrument therefore no rights were affected. It appears to us wholly unpermissible to bring in the subsequent attempt of the Court of Claims to adjudicate on a *quantum meruit* under an act of Congress that had not then been passed, as satisfying the conditions of the contract and binding the parties by virtue of the agreement if not by its own proper force.

The second contract was not made until nine days later—not improbably on the footing that the attempt of April 3 had failed. This contemplated a fixing of the attorneys' fees by Congress, again a different course from that taken by events. We see no reason for supposing that it was intended to change the relations between Robertson and Gordon. Primarily they were on one side of the agreement against Butler and associates on the other. Secondarily they were recognized as entitled to equal shares. Neither do we see reason for connecting this with the contract of April 3, as alternatively intended to cover the whole ground and to supersede that of March 28 in suit. These later contracts were on their face successive; the earlier one applied only to an event that has

not happened and the latter if applicable in any degree does not help the defendants' case. It is not to be supposed that it tacitly overrode the agreements of the parties in March to pay certain other lawyers out of their respective shares—and if not, the March contract remained on foot.

Finally as to the defence of *res judicata* the short answer is that the Court of Claims had no jurisdiction of either the subject-matter or the parties. Of course jurisdiction could not be claimed unless the special act of June 21, 1906, heretofore mentioned, conferred it. That act authorized the court to "render final judgment in the name of Butler and Vale . . . for the amount of compensation which shall be paid to the attorneys who have performed services as counsel on behalf of said Indians in the prosecution of the claim of said Indians for payment for said land, and in determining the amount of compensation for such services the court may consider all contracts or agreements heretofore entered into by said Indians with attorneys who have represented them in the prosecution of said claim, and also all services rendered by said attorneys for said Indians in the matter of said claim." It then directed that Butler and Vale should file a petition and that the Secretary of the Treasury should pay them the sum awarded on final judgment out of the sum appropriated for the Indians—payment to be in full compensation of all attorneys who had rendered services to the Indians in the matter, "the same to be apportioned among said attorneys by said Butler and Vale as agreed among themselves" provided that before any attorney having an agreement with Butler and Vale should be paid he should deliver to the Secretary of the Interior a discharge of all demands for services in the matter of this Indian claim.

Argument hardly can make the intent of the statute clearer. The question before the Court of Claims was the

amount and the whole amount to be deducted from an Indian appropriation before it should be paid over for the Indians by the United States. That necessarily concerned the United States. The manner in which the fund should be distributed did not concern it at all. Therefore it selected representatives of all claimants against the fund, ordered the sum deducted to be paid to them and transferred all claims outstanding against the Indians to the sum so paid over—a method familiar to our legislation. *United States v. Dalcour*, 203 U. S. 408, 422. The reference to contracts with the Indians merely permitted the court to take them into consideration in determining what was a fair total, without being governed by them, as for instance, the expired Maish-Gordon contract which allowed ten per cent; and to the same end other services were to be taken into account. But the act itself determined what parties were to be before the court, namely Butler and Vale, they being the only ones necessary for the object in view. The plaintiff could not have made himself a party if he had wanted to, and he did not want to and did not—he rightly understood that his claim was to be satisfied outside of the suit before the court. We do not think a discussion of the evidence necessary, although we think that the courts below mistook its effect. It is enough to say that the decree of the Court of Claims perhaps was not intended to have effect and certainly could not have effect in deciding the rights of the parties among themselves.

*Decree reversed.*

MR. JUSTICE PITNEY was not present at the argument and took no part in the decision of this case.